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THE ADMINISTRATION OF JUSTICE FROM HOMER TO ARISTOTLE

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THE ADMINISTRATION OF JUSTICE FROM HOMER TO ARISTOTLE

BY

ROBERT J. BONNER, PH.D.

Hon. Litt.D., Toronto; Hon. Litt.D., Dublin
Corresponding Member of the Academy of Athens

AND

GERTRUDE SMITH, PH.D.

Professor of Greek, University of Chicago

VOLUME II

δίκας τε δοῦναι καὶ λαβεῖν ηὗρον Ἀθηναῖοι πρῶτοι.
—AELIAN

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PREFACE

The main theme of the first volume of the *Administration of Justice from Homer to Aristotle* is the growth and development of the judiciary. The present volume is devoted to matters of practice and procedure. We have, however, not attempted to describe all the suits civil and criminal and their distribution among the various magistrates, judicial officers, and boards and the process of litigation from the initiation of a suit to the verdict. These topics have been treated amply by Lipsius in *Das Attische Recht und Rechtsverfahren*, pages 53 ff. But since this work was begun with the publication of the first part in 1905 and completed in 1915 many of Lipsius' conclusions and opinions have been questioned and refuted.

In the following pages a number of aspects of Athenian litigation have been treated in considerable detail, the choice of topics being more or less arbitrary. Our purpose has generally been to bring conveniently together in one volume the results of various articles, monographs, and books, in which the work of Lipsius and other scholars working in this field has been either criticized or amplified. A certain amount of this material was included in Volume I, where it seemed advisable to combine it with the discussion of the judiciary, e.g., the treatment of the *ἀνάκρισις*, a discussion of the date of the introduction of written evidence, and certain features of homicide trials. The chapter on "Litigants" is necessarily in a large measure descriptive and expository, but even here matters at issue have been discussed in full detail. Of a different character is the chapter on "Oaths." In order to give a complete picture of the importance of the oath in Athenian public life, we have gone beyond its use in litigation. It has been suggested that in this volume we discuss the merits and demerits of the Athenian judicial system. This we have with some misgiving attempted to do in the last chapter.

In the matter of translations we have used Kennedy's version of Demosthenes. For other authors we have in general used the translations which are available in the Loeb Classical Library.

We wish to thank the American Council of Learned Societies and the University of Chicago for grants which have made the preparation and publication of this work possible. Thanks also are due to Dr. Lloyd Stow, now assistant professor of Greek in the University of Oklahoma, for the invaluable assistance he rendered us at every stage of the work. We wish to thank also Miss Julia Henderson for her competent assistance in proofreading and in the preparation of the Index.

It is hoped eventually to add a third volume devoted to various aspects of other Greek legal systems.

ROBERT J. BONNER
GERTRUDE SMITH

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CHAPTER I

INTRODUCTION

The names of a multiplicity of both private and public suits are known and recognized for the fifth and fourth centuries in Athens.[1] But an investigation into their origin and the date of their institution proves rather disappointing.[2] It is often impossible to determine even approximately when the actual suit was created. Therefore any attempt to discuss the origin of Athenian suits must be attended with a great deal of conjecture, which in turn calls for caution and hesitation in making statements of a very definite character. However, such an investigation, even though it affords little that is conclusive in the way of settling the exact period at which different suits arose, may yet yield some points of interest in indicating how one suit grew out of another and hence how the great variety of suits arose.

The Athenians had great respect for the antiquity of law, and hence it was their custom to attribute laws to their famous and more ancient lawgivers, Draco and Solon. Some of these attributions there is no reason to doubt. Others, however, must be treated with extreme caution. We possess no evidence for the period between the Heroic Age when the administration of justice was largely an informal thing and the codification of the laws by Draco. Yet this was a formative period when many of the suits which are so well known in later times must have been instituted in some form. In

[1] Cf. the Index to Lipsius, *Das Attische Recht und Rechtsverfahren*, pp. 994 f., *s.v.* γραφή and δίκη.

[2] Ancient writers were interested in classifying the offenses which were the basis for suits. In his description of Hippodamus, Aristotle says that among other tripartite divisions he recognized three offenses for which lawsuits (δίκαι) could be brought, namely, ὕβρις, βλάβη, θάνατος (*Politics* 1267B; cf. Newman, *ad loc.*). Hermann-Thalheim (*Griech. Rechtsalt.*, pp. 38 ff.) traces in Attic law a threefold classification of offenses, ὕβρις, κακουργία, and φόνος. Demos. xxiv. 192 classifies the subject matter of laws from a different point of view, by distinguishing those which have to do with individuals and those which have to do with the state.

some cases the laws of Solon were doubtless restatements of the laws of Draco. Furthermore, in making his code Draco did not initiate entirely new laws, but to a large extent, like the early lawgivers generally, he reduced to writing a mass of customary law which his codification put in an orderly and usable form, thus removing the administration of justice farther from the whim of the magistrate and making it more equitable. There is frequently disagreement among ancient writers about the attribution of particular laws to particular lawgivers. There was a law to the effect that a citizen who had no occupation was to be punished and that any citizen might bring suit against him. The procedure was the γραφὴ ἀργίας. Plutarch attributes this law to Solon, but says that Theophrastus believed that it was the work of Peisistratus.[1] Diogenes Laertius[2] attributes it to Solon, but quotes Lysias as attributing it to Draco. The truth of the matter is probably that there was an old tribal law which prohibited idleness. This Draco included in his code, and it was later adopted by Solon.[3]

The origin of many suits may thus be pushed back into very early times. A man was always quick to avenge any injury to himself or to his property. It cannot be determined when the state offered him assistance by establishing suits for dealing with his wrongs. But the earliest codes always dealt with such offenses. Maine[4] sees in the codes a means of protection against the degeneration and corruption of customary usages. This is undoubtedly true, to some extent at least. The early codes contained provisions regarding assault, housebreaking, arson, all sorts of family matters, debt, slavery, transfer and distribution of property, business relations, perjury, religious matters, homicide, sumptuary legislation.[5] Many of the suits which would be used to deal with infractions of these laws must go back as far as Draco at

[1] *Solon* xxii. [2] i. 55.

[3] Cf. Freeman, *The Work and Life of Solon*, p. 137.

[4] *Ancient Law*, p. 16; cf. p. 25.

[5] Cf. Bonner and Smith, *Administration of Justice from Homer to Aristotle*, I, 67 ff. (hereafter referred to as *supra*, I).

least. For example, various laws regarding theft are attributed by Demosthenes to Solon.[1] But Draco must have had some regulations concerning theft and the procedure against it in his code.

Solon is regarded as having established several different types of action for theft: summary arrest of the alleged wrongdoer, a complaint to the archon who took over the suit, a public suit, or a private suit before an arbitrator.[2] This is an illustration of a wrong which could be handled by either a public or a private suit, *γραφὴ κλοπῆς* or *δίκη κλοπῆς*. *ὕβρις* furnishes another example, for both *γραφὴ ὕβρεως* and *δίκη ὕβρεως* are known. Perhaps the explanation is that in some crimes which would naturally be handled by private suits it was necessary if the victim were incapacitated to give opportunity *τῷ βουλομένῳ* to prosecute.[3] It may be suggested that in each case the private suit is earlier.

If one studies the lists of suits known in Athens, it becomes apparent that many suits overlap others. This is due to the fact that the original suit was very general in its terms. Then many specific suits were instituted which covered parts of the general charge. The charge of *ἀδικία* in the decree of Cannonus is extremely general. There soon arose *γραφὴ ἀπάτης τοῦ δήμου* and *δίκη καταλύσεως τοῦ δήμου*, which would certainly be covered by the decree. Likewise *δίκη ἀφορμῆς*, the suit to recover capital, is only a specific form of the *δίκη χρέως*. In this way many suits grew out of others.

In some cases the time at which a suit originated can be determined with at least some degree of accuracy. It is clear that some suits belong to the period of the fully developed democracy. For example, the various actions against sycophants could not have been instituted until sycophants became a feature of Athenian life under the fully developed democracy. And the process known as *προβολή* could have

[1] xxiv. 105, 113, 114; xxii. 26.

[2] Demos. xxii. 26; cf. Freeman, *op. cit.*, p. 125.

[3] In English common law, in a number of cases both a civil and a criminal suit are permitted. The reason for this is that the action complained of might give rise to a breach of the peace.

developed only after the ecclesia became strong. Some inferences may be drawn about the antiquity of certain suits from the bodies and magistrates who had charge of them. In general, in the case of the Areopagus it is to be expected that cases handled by that body are of considerable antiquity because the tendency was to deprive this court of its privileges and duties and it is extremely unlikely that it acquired jurisdiction over any new cases after the time of Solon. From the earliest time of which we have record the Areopagus had jurisdiction over homicide cases, a jurisdiction which it never entirely lost. The *δίκη φόνου* is undoubtedly older than the code of Draco, since in the main Draco merely reduced to writing practices which were already in existence. For the *δίκη φόνου* we have a comparative wealth of evidence.[1] Although we do not know when the state took charge in homicide, yet it is clear that it preserved in the *δίκη φόνου* most of the features which appear in the attitude toward homicide in the Heroic Age. And by piecing together the information in Homer, the fragments of Draco's code, and the various pieces of evidence from the fifth and fourth centuries we have a fairly complete picture both of the family attitude which started action for homicide and of the various stages in the development of homicide procedure. This is far more information than the evidence usually affords. For example, the Areopagus continued through the fifth and fourth centuries to try some cases of *ἀσέβεια*, although in general the dicasteries had charge of these cases. It may plausibly be argued that since the Areopagus had general surveillance in all matters of religion, all such cases originally came before the Areopagus. This indicates the great antiquity of the *graphé asebeias*. Homer and Hesiod furnish an excellent description of the public attitude toward impiety which was to result in the *graphé asebeias*, but it is impossible to say when such an action was instituted. The earliest recorded case is that brought against Aeschylus for divulging the Mysteries in his plays.[2]

[1] Cf. *supra*, I, 111 ff.

[2] Schol. on Arist. *Nic. Ethics* 1111*a;* Aelian *V.H.* v. 19; Clem. Alex. *Strom.* ii. 387.

The creation of new magistrates was doubtless occasioned by excess of new business, too great for the existing magistrates to handle. Some of this new business may have been in the form of new types of suits. Lipsius[1] suggests that the *eisagogeis* may have been created to handle monthly suits. At any rate they handled such suits. Lipsius further suggests that the date of the institution of the office may be the middle of the fifth century, when the press of business necessitated new boards for handling it, and although it cannot be proved, this is a plausible suggestion. The development of the monthly suits themselves must have been due to commercial reasons. They, like *δίκαι ἀπὸ συμβόλων*, could have been of consequence only after Athens had become an important trading center.

On the other hand, sometimes the duties of an official changed fundamentally and his old duties were assumed by a new board. So when the polemarch ceased to be a military officer, military offenses were tried by his successors, the generals.

Constitutional changes occasioned new laws which gave rise to some new suits. For example, Solon's laws on adoption and bequests may have given rise to the various suits regarding inheritance. Solon is credited by Aeschines[2] with a law against outrage which protected a child, or a man, or a woman, free or slave, from any injury or assault. Doubtless this law explains the origin of the *δίκη ὕβρεως* and the *γραφὴ ὕβρεως*. Again Aeschines[3] attributes to Solon a law providing for punishment by *ἀτιμία* of men who had not gone on all of the campaigns to which they were assigned or who had been guilty of cowardice. The suit used against such offenders was the *γραφὴ δειλίας*.[4] In the work of Cleisthenes may be included the decree of Cannonus, which provided for trial by the ecclesia of those who were charged with doing wrong

[1] *Op. cit.*, p. 84; for an opposing view cf. Wilamowitz-Moellendorff, *Aristoteles und Athen*, I, 223.

[2] i. 15. [3] i. 29.

[4] Aeschin. iii. 175 f. For a convenient summary of the laws of Solon cf. Freeman, *op. cit.*, pp. 112 ff.

to the people (*ἐάν τις τὸν τῶν Ἀθηναίων δῆμον ἀδικῇ*).[1] *ἀδικία* is a very general charge, and in fact no *γραφὴ ἀδικίας* is known.[2] Miltiades was charged with *ἀπάτη Ἀθηναίων*, a more specific offense, but certainly included in *ἀδικία*.[3] To Cleisthenes the institution of ostracism is also attributed.[4]

This survey shows that it is futile to attempt to discover the origin of all the Athenian suits the names of which are known.

[1] Cf. *supra*, I, 205 ff.

[2] The *γραφὴ ἀδικίου* was a charge used against officials for misuse of authority.

[3] Herod. vi. 136.

[4] *Supra*, I, 193.

CHAPTER II

LITIGANTS[1]

Before the time of Draco only injured parties could institute legal prosecutions, either personally before the magistrates who had full authority to give final decisions in all cases that came before them or indirectly through the agency of an Areopagite in the Areopagus. Draco extended the privileges of litigants in two ways. In the last section of the so-called constitution of Draco, the only genuine portion of the document, the injured party was permitted to lay information (*εἰσαγγέλλειν*) before the Areopagus. This means that he had the right to appear in person before the council and no longer had to depend on enlisting the interest of a member of the council in order to get justice.[2] Secondly, in his code Draco made it lawful for any citizen to slay out of hand any homicide who returned illegally from exile, or to arrest him and take him before the proper magistrates.[3] In the resulting inquiry the alleged criminal would be prosecuted by the citizen who arrested him. The permission given by this provision to any citizen to prosecute in this particular type of case is the precedent for Solon's famous prescription *τὸ ἐξεῖναι τῷ βουλομένῳ τιμωρεῖν ὑπὲρ τῶν ἀδικουμένων*.[4]

Litigants were obliged to handle their cases before a magistrate themselves. The hearing was doubtless more or less informal, as may be gathered from the fifth-century *ἀνάκρισις*, which was a survival of the pre-Solonian magisterial trial.[5] As the name indicates, the proceedings consisted chief-

[1] Lipsius (*Das Attische Recht*, pp. 789–803) has sufficiently answered the question as to who could be a litigant.

[2] Arist. *Ath. Pol.* iv. 4; cf. *supra*, I, 95.

[3] Cf. *supra*, I, 119 ff.

[4] Arist. *Ath. Pol.* ix. 1; cf. *supra*, I, 168.

[5] Cf. *προανακρίνειν* in Arist. *Ath. Pol.* iii. 5; cf. *supra*, I, 283.

ly of questions addressed by the magistrates to the litigants. That the litigants also questioned each other is indicated by the later practice when either litigant was allowed to call up his opponent in court and address questions to him. Examples are found in the earlier orators and in the *Apology* of Plato.[1] Under these circumstances it was no great hardship to require litigants to take their own cases. But when they had to face the big juries of the fifth and fourth centuries and deliver set speeches to an unusually critical audience it was quite a different matter. Their predicament was comparable to that of litigants under the Solonian system when the decision of the magistrate was appealed and the litigants had to appear before the Heliaea, which was a numerous body.[2]

A litigant could always, with the permission of the jury, have the assistance of others in presenting his case in court. This assistance was of two kinds. A man might refrain from speaking himself and secure another to speak in his stead, or he might have others speak for him at the conclusion of his speech. Strictly speaking, the first type of advocate should be called *ὁ ὑπεραπολογούμενος* and the second type *ὁ συναπολογούμενος*.[3] But both are denominated indifferently *συνήγορος* or *σύνδικος*. *Συνήγορος* etymologically means "one who speaks with another"; *σύνδικος*, "one who aids another in litigation." "Advocates" in the sense of *οἱ συναπολογούμενοι* are constant features in fourth-century litigation, but *οἱ ὑπεραπολογούμενοι* are comparatively rare. Only in exceptional circumstances could a litigant be excused altogether from speaking.

The first appearance of "advocates" of this class (*οἱ ὑπεραπολογούμενοι*) was at the trial of Miltiades in the assembly in 489 B.C.[4] for deceiving the people. Owing to a severe wound, from which he eventually died, he was unable to speak in his own behalf, but was defended by his friends

[1] Lysias xii. 25; xxii. 5; Plato *Apol.* 24C ff.

[2] For the composition of the Heliaea cf. *supra*, I, 162 f.

[3] Lycurg. i. 138.

[4] Herod. vi. 136; cf. *supra*, I, 197, 299.

(*προκειμένου δὲ αὐτοῦ ἐν κλίνῃ ὑπεραπελογέοντο οἱ φίλοι*). As Miltiades was present in the assembly, lying on a couch, he may very well have informally requested the ecclesia to listen to his friends speaking in his behalf since he was obviously in no position to defend himself. But his friends may have come to his assistance without either his request or the permission of the assembly, for any member could address the assembly. At the trial of the generals before the assembly in 406 B.C., Euryptolemus, the relative of one of the generals and a friend of another, arose and proposed to speak in their defense (*ὑπεραπολογησόμενος*).[1] In the course of the proceedings at this meeting of the assembly the generals were not heard at all. They had already spoken at the previous meeting.[2] In one other case the whole burden of the defense was assumed by another. Isocrates was drawn into a lawsuit in connection with a trierarchy in 355 B.C., but, owing to illness, was unable to handle the case in court. In his stead his adopted son Aphareus appeared. Here Aphareus was a real advocate (*ὑπεραπολογούμενος*).[3] A somewhat similar case occurred in the practice of Demosthenes in 350 B.C. It was a special plea in *Apollodorus* v. *Phormio*,[4] in which the defendant spoke first. He was represented by counsel:

> Phormio's inexperience in speaking and utter incapacity you see yourselves, men of Athens. It is necessary for us his friends to state and explain to you those particulars which, from having so often heard him relate them, have become known to us; that when we have rightly informed you and put you in possession of the case you may give a just and conscientious verdict.

Phormio was originally a slave and never learned Greek well enough to appear before the sensitive and critical Athenians.[5] It would appear that he had given utterance to a few halting sentences asking to have others speak for him.

Permission of the jury to call upon advocates was re-

[1] Xen. *Hell.* i. 7. 16. [2] *Ibid.* i. 7, 9.

[3] Isoc. xv; cf. Jebb, *Attic Orators*, II, 132; Bonner, "The Legal Setting of Isocrates' *Antidosis*," *CP*, XV, 193 ff.

[4] Demos. xxxvi. 1. [5] *Ibid.* xlv. 30, 81.

quired[1] but never refused. Requests are often informal and perfunctory, and the acquiescence of the jurors is assumed. A lengthy and elaborate appeal to the jurors to hear an advocate is found in Hyperides.[2] At first advocates were generally drawn from the litigant's friends, relatives, clubfellows, and fellow-demesmen.[3] These were the men who knew him and his affairs best. But in course of time advocates tended to become professional in private as well as in public suits and the practice of paying advocates arose. Demosthenes cites a law which forbade the paying of advocates in private suits:

> If anyone enter into a combination[4] or join in bribing the Heliaea or any of the courts at Athens or the senate, giving or receiving money for corrupt purposes, or organize a club for the subversion of the democracy, or, in the capacity of advocate, receive money in private or public cases, for any such act an indictment shall lie before the thesmothetes.[5]

This law is regarded as undoubtedly genuine by Drerup[6] and by Staeker.[7]

The law has some indications that may help to fix an approximate date. The occurrence of the word *ἡλιαία* points to an early date, but the occurrence of *δικαστήριον* also shows that the Heliaea may be the court of the thesmothetai.[8] Both *ἡλιαία* and *δικαστήριον* are mentioned for the sake of precision and accuracy. The reference to bribery points to the late fifth century, when jury bribery was so successfully

[1] *Ibid.* xxxiv. 52.

[2] iv. 11.

[3] Demos. xxxii. 31; Isoc. xxi. 1; Andoc. i. 150.

[4] *συνιστῆται* really means "entering into a conspiracy to defeat the ends of justice" as is shown in xlvi. 25: *ἐξαπατῶν δὲ τοὺς δικαστάς, συνιστάμενος δ'ἐπὶ ταῖς δίκαις.*

[5] *Ἐάν τις συνιστῆται, ἢ συνδεκάζῃ τὴν ἡλιαίαν ἢ τῶν δικαστηρίων τι τῶν Ἀθήνησιν ἢ τὴν βουλὴν ἐπὶ δωροδοκίᾳ χρήματα διδοὺς ἢ δεχόμενος, ἢ ἑταιρείαν συνιστῇ ἐπὶ καταλύσει τοῦ δήμου, ἢ συνήγορος ὢν λαμβάνῃ χρήματα ἐπὶ ταῖς δίκαις ταῖς ἰδίαις ἢ δημοσίαις, τούτων εἶναι τὰς γραφὰς πρὸς τοὺς θεσμοθέτας* (xlvi. 26 [trans. Kennedy]); the date of the speech is 351–350 B.C.; cf. also xx. 152.

[6] "Über die bei den Attischen Rednern eingelegten Urkunden," *Jb. f. cl. Phil.*, Supplbd. XXIV (1898), 304–5.

[7] *De litis instrumentis*, pp. 28 ff.

[8] Cf. *supra*, I, 156 f.

practiced on a large scale by Anytus in 409 B.C.[1] One might expect this exploit of Anytus to be followed by legislation. The archonship of Euclides in 403–402 B.C. is a likely date for a law that would affect mainly the rich. No poor man could bribe a jury. Similarly, the provision against organizing clubs points to the same date, for clubs played a very prominent part in the revolutions of 411 and 404 B.C. There were at least two motives for legislation against the payment of advocates. The rich had a great advantage over the poor in that they had the means to retain advocates.[2] In the second place, although it was quite in accordance with the democratic spirit that mutual helpfulness should be encouraged among the citizens,[3] when these services were rendered for a fee and tended to become professional public opinion became hostile. The records of fifth-century litigation are not sufficient to enable us to trace the progress of advocacy.[4] But the fact that Thucydides emphasizes the activities of the clubs in litigation as a prominent feature of their work in 411 B.C. shows that advocacy was a common practice in the fifth century.[5] Here again the facts point to the democratic restoration as the most likely date for the law regarding advocacy.

The law forbidding the payment of advocates could not be enforced,[6] but it nevertheless embarrassed the advocate who could not claim relationship or close association with the litigant. He would at once be suspected of appearing for financial reasons. In *Theomnestus* v. *Neaera* the plaintiff made a brief introductory statement without evidence[7] and then introduced his brother-in-law, the litigious Apollodorus, who made the real speech. Theomnestus does not rely upon the relationship, but upon the wrongs done to Apollodorus by Stephanus, the *kurios* of Neaera, as a ground for calling Apollodorus as

[1] For the whole question of bribery of courts see the excellent discussion of Calhoun, *Athenian Clubs in Politics and Litigation*, pp. 66 ff.

[2] Demos. xxi. 112; xlvi. 26.

[3] Hyper. i. 19–20.

[4] Cf. Blass, *Attische Beredsamkeit*, I, 40 ff.

[5] Calhoun, *op. cit.*, pp. 85 ff.

[6] Lycurg. i. 138.

[7] Demos. lix. 1–15.

advocate. The hostility of Apollodorus toward Stephanus is the main reason why the former was willing to appear as an advocate, but when Theomnestus comes to put the matter to the jury, his own need of help is also emphasized:

> I have to ask a favor of you, men of the jury, which it becomes me to ask, being a young man and having no experience in public speaking; that you will allow me to call Apollodorus to be my advocate upon this trial. For he is older than myself, and has more knowledge of the laws, and he has been injured by my opponent Stephanus, and he has given close attention to these matters; so that there can be no prejudice against him for retaliating on the party who first attacked him.

In another speech in the Demosthenic corpus the plaintiff Epichares, a young and inexperienced speaker, tells the jury that he has been

> betrayed by persons who, after being trusted by me on account of their enmity toward Theocrines, after hearing the facts and promising to cooperate with me in this cause, have now left me in the lurch and settled with my adversary, so that I shall not even have an advocate to plead for me unless some of my relations should be kind enough to assist me.[1]

Epichares pays lip service to the fiction that advocates are normally a man's relatives, friends, and associates. But both Theomnestus and Epichares make it clear that advocates or their principals were ready to explain the appearance of a particular advocate on the ground of his hostility to the other side in the case.

An advocate, however, who was not closely related to, or associated with, a litigant was more or less on the defensive. Handbooks on rhetoric regularly suggest reasons that may be given by an advocate for his appearance in a case:

> *Ἐὰν δὲ ὑπὲρ ἄλλου λέγῃς, ῥητέον ὡς διὰ φιλίαν συνηγορεῖς, ἢ δι' ἔχθραν τοῦ ἀντιδίκου, ἢ διὰ τὸ τοῖς πράγμασι παραγενέσθαι, ἢ διὰ τὸ τῷ κοινῷ συμφέρον, ἢ διὰ τὸ ἔρημον εἶναι καὶ ἀδικεῖσθαι ᾧ συνηγορεῖς.*[2]

After the middle of the fourth century the advocate is a well-established factor in litigation. The pretense that the advocate is a relative or an associate is abandoned. He is the one who is most able to help the litigant. Plaintiffs and pros-

[1] *Ibid.* lviii. 4.

[2] Anaximenes 36, in Spengel-Hammer, *Rhetores Graeci*, I, 87, ll. 18 ff.

ecutors were quick to realize how helpful advocates were to their clients and took every means to neutralize their influence by attacking both their motives and their character.[1] Demosthenes, in his speech against Midias, protests against the advocate in the name of democracy: *μὴ γὰρ ἔστω μηδεὶς ἐν δημοκρατίᾳ τηλικοῦτος, ὥστε συνειπὼν τὸν μὲν ὑβρίσθαι τὸν δὲ μὴ δοῦναι δίκην ποιῆσαι.*[2] The most bitter attack on advocates is found in Lycurgus in his speech against Leocrates.[3] He goes so far as to say that those who plead the cause of the defendant should themselves be put on trial. In contrast with Lycurgus, Hyperides, in reply to an attack on advocates, says:

> Of the many excellent features of democracy which one is more in keeping with the democratic spirit than the custom of allowing anyone who wishes [*τὸν βουλόμενον*] to go to the aid of an inexperienced man who is involved in dangers and is unable to defend himself adequately?[4]

The words *τὸν βουλόμενον* inevitably recall the same words in the Solonian law which permitted anyone who wished to prosecute a wrongdoer in the place of the injured party who was incapable for any reason of seeking justice for himself. Thus interpreted advocacy becomes a praiseworthy exhibition of the spirit of mutual helpfulness so characteristic of the Greek ideal democracy.

Comparatively few speeches of advocates have been preserved. Where the advocate substitutes for the principal, his speech is in content not distinguishable from the speech of a litigant. Typical examples are Apollodorus' speech as an advocate in the case of *Theomnestus* v. *Neaera*[5] and the speech for Phormio in *Apollodorus* v. *Phormio*.[6] Some believe that Demosthenes delivered the speech, but there is scarcely enough evidence to warrant this conclusion.[7]

[1] Demos. xlviii. 36: *ἵνα μὴ αὐτίκ' ἐξαπατήσωσιν ὑμᾶς οἱ ῥήτορες, οὓς οὗτοσὶ παρεσκεύασται ἐπ' ἐμέ*; cf. lviii. 53.

[2] xxi. 207.

[3] i. 135.

[4] iv. 11; cf. i. 10.

[5] Demos. lix. 16 ff.

[6] *Ibid.* xxxvi.

[7] Cf. Sandys and Paley, *Demosthenes' Select Private Orations*, II, xxvii, n. 1; Blass, *op. cit.*, III, 1, 461 ff.

Quite a different type of speech is the fourth oration of Isaeus, delivered in behalf of Hagnon and Hagnotheus, claimants for the estate of Nicostratus, a mercenary soldier who died abroad. It is a careful and shrewd commentary on the case as developed by the main speaker, and forms the nearest approach we have to an address by a modern lawyer to a jury after the evidence has been produced. The writer of the argument to the speech says that Isaeus himself delivered it, which statement, however, is improbable.[1] It was inevitable that in many of these *συνηγορίαι* there should be much virtual evidence. In the fifth oration of Lysias, the advocate really testifies to the public services of Callias. Isocrates' *Nicias* v. *Euthynus* is an advocate's speech which the advocate delivers in place of the plaintiff. Much of the matter in the speech is hearsay, but some of the statements are made on the speaker's own knowledge without corroboration. In all probability this speech is a mere rhetorical exercise. But this need not make it less useful for the examination of the technique of an advocate's speech.[2]

Sometimes the advocate asked for a favorable verdict as a recognition of his own services to the state: *ἀλλὰ καὶ τῶν ξυνερούντων αὐτοῖς ἄξιον θαυμάζειν, πότερον ὡς καλοὶ κἀγαθοὶ αἰτήσονται, τὴν αὐτῶν ἀρετὴν πλείονος ἀξίαν ἀποφαίνοντες τῆς τούτων πονηρίας*.[3] There were doubtless many advocates, however, who merely made emotional appeals to the juries which are on the same plane as the tears and gestures of female relatives and children who were brought into court.[4] None of these appeals has been preserved. The advocate who, like Apollodorus,[5] was more skilled in the laws than his principal might often give technical aid and advise as to the conduct of the case as well as speak in court.[6]

Helpful as advocates undoubtedly were, nothing could serve the interest of a litigant so well as a speech delivered by

[1] Forster, *Isaeus*, p. 128.

[2] Isoc. xxi; cf. Jebb, *op. cit.*, II, 221 ff.; Bonner in *CP*, XV, 384 ff.

[3] Lysias xii. 86.

[4] Cf. Socrates' condemnation of the practice, Plato *Apol.* 34C ff.

[5] Demos. lix. 15. [6] Lycurg. i. 59.

himself. But there were many litigants unequal to this task. To meet this situation there appeared a new profession, the writing of forensic speeches to be recited, as their own, by litigants in court. The origin of the profession of speech writer or logograph could not be anterior to the development of the art of rhetoric by Corax and his pupil Tisias in Syracuse during the establishment of democracy after the fall of tyranny in 466 B.C. Tisias is said among his other services to rhetoric to have composed the most effective speech of his day for a Syracusan woman in a claim for money owed: *καίτοι ἄλλα τε Τισίας ἐς λόγους ἐσηνέγκατο καὶ πιθανώτατα τῶν καθ' αὑτὸν γυναικὶ Συρακουσίᾳ χρημάτων ἔγραψεν ἀμφισβήτησιν.*[1] This is the first instance of a written forensic speech.

There is good evidence for believing that Pericles was the first Athenian to reduce a speech to writing, while others were still extemporizing with the help of memorized commonplaces.[2] One may suppose that this practice refers to forensic speeches such as his speech as prosecutor of Cimon, or as representative of Aspasia, or in his own defense. A passage in Plutarch's *Life of Pericles*[3] seems to indicate that in debate he trusted to his own oratorical ability and the inspiration of the moment rather than to set speeches. This is what would be expected. A man may make an exceedingly effective set speech in a deliberative body, but in debate no one can anticipate the turns a discussion will take. The best preparation, as the Xenophontic Socrates pointed out, was a sound knowledge of the needs of public policy.[4]

The speech-writer, or logograph, as he was called, was primarily a rhetorician. Often he was a teacher,[5] as Isaeus was the teacher of Demosthenes. But he was much more than a writer of a speech to be recited by his client. There is plenty of evidence that he advised his client very much as

[1] Paus. vi. 17. 8; Blass warns us to take the statement with caution (*op. cit.*, I, 21).

[2] Cf. Suidas, *s.v.* Περικλῆς: *πρῶτος γραπτὸν λόγον ἐν δικαστηρίῳ εἶπεν, τῶν πρὸ αὐτοῦ σχεδιαζόντων.* Cf. Blass, *op. cit.*, I, 35, n. 5.

[3] viii. 4: *περὶ τὸν λόγον εὐλαβὴς ἦν, ὥστε ἀεὶ πρὸς τὸ βῆμα βαδίζων εὔχετο τοῖς θεοῖς μηδὲ ῥῆμα μηδὲν ἐκπεσεῖν ἄκοντος αὐτοῦ πρὸς τὴν προκειμένην χρείαν ἀνάρμοστον.*

[4] Xen. *Mem.* iii. 6; iv. 2.

[5] Cf. Isoc. xiii. 9 ff.

does an English solicitor.[1] There was no man who could do more for a client than Antiphon,[2] whether his business lay in the courts or in the assembly. And in the *Clouds*[3] the chorus promises Strepsiades that on the completion of his legal education many clients will come to consult him on "claims and counterclaims."

It is not easy to determine the kind of services which a logograph might perform for a client beyond preparing the speech for him to recite in court with the evidence properly distributed. Where different remedies were available, the logograph doubtless suggested the best procedure.[4] This was important as an opponent was ever ready to take advantage of any false step. "It is the practice," says Demosthenes, "with defendants who have done wrong, in order to defeat the proceedings against them, to suggest that some other proceedings which are not practicable should have been adopted."[5] It was *de jure* the business of a magistrate to reject a case which did not lie within his jurisdiction. But the magistrates were chary of rejecting a case if a litigant insisted. In the matter of citation, interpretation, and application of laws, the services of an experienced logograph would be invaluable. Especially was this true in cases of unconstitutional legislation (*γραφὴ παρανόμων*), or the devolution of estates as seen in the speeches of Isaeus. No one could be deceived by the naïve statement of a litigant that he got the laws he cited from the official copies[6] or that his technical knowledge of litigation was the result of study and investigation forced upon him by his present predicament.[7] The advice of a logo-

[1] Demos. xlvi. 1: *οἱ γράφοντες καὶ οἱ συμβουλεύοντες ὑπὲρ Φορμίωνος πολλοί.*

[2] Thuc. viii. 68.

[3] Aristoph. *Clouds* 471.

[4] Cf. Demos. xxii. 25; liv. 1.

[5] xxi. 27. The abuse of impeachment as a process in trivial matters, which was so roundly condemned by Hyperides (iv. 1–4; cf. *supra*, I, 296), was in all probability due to the influence of logographs upon their clients.

[6] Lysias i. 30.

[7] Demos. liv. 17: *ἀνάγκη γάρ μοι ταῦτα καὶ ζητεῖν καὶ πυνθάνεσθαι διὰ τοῦτον* (defendant) *γέγονεν.*

graph could be useful in instituting cross-actions and countersuits which were so constantly used in litigation.

There are no definite proofs as to the help given by a logograph to his client in what may be called the strategy of litigation. But Xenophon has recorded in his memoirs of Socrates how Socrates advised his friend Crito to retain the services of one Archedemus, a man of affairs and an excellent speaker, to look after his legal business. Archedemus performed his task so well that others also employed his services. Nowadays such a man would be a solicitor or an attorney. One may imagine that Crito could very well take care of his own forensic speeches and that Archedemus confined his activities to securing evidence on which to base countersuits and to negotiating with those who were willing to compromise or surrender at discretion. But the statement that he was a very competent speaker[1] would seem to indicate that if cases came to court he may very well have aided his patron either in the preparation of his speech or as *συνήγορος*.

A prosecutor must to the best of his ability anticipate the arguments of the defendant. In arbitration cases, where practically all the evidence was filed, the logograph had at his disposal documents which betrayed the line of defense fairly well;[2] but in other cases very little that was helpful to a litigant was necessarily disclosed at the *anakrisis*.[3] But there were other sources of information open to litigants regarding the intentions of their opponents. Litigants frequently refer to the help they have received from friends,[4] and indeed there were not a few services which friends could successfully undertake. It was not an uncommon practice in Athens for persons involved in a dispute to talk over the matter with each other and with their friends. If the dispute finally came before a court, the information gathered in these informal talks

[1] Xen. *Mem.* ii. 9. 4: *πάνυ μὲν ἱκανὸν εἰπεῖν.*

[2] Demos. xxvii. 53; xxxix. 22.

[3] Cf. *supra*, I, 283 ff.; Dorjahn ("Anticipation of Arguments in Athenian Courts," *TAPA*, LVI, 274 ff.) has additional reasons in support of this view.

[4] Demos. liv. 1.

might often prove very valuable. A client of Hyperides says in substance:

> When I learned the extent of my calamities, then I called my friends and relatives and we read the copy of the contract. After we had discussed the case, it was decided to go to Athenogenes [the defendant in the subsequent suit] and talk over the matter with him.[1]

The discussion revealed the fact that Athenogenes intended to rely on the contract. Consequently, Hyperides had to emphasize in his speech for his client the equity of his side in the dispute. Similarly in the Dionysodorus case in the Demosthenic corpus,[2] before the suit was filed there were some charges and recriminations between the parties which may well have been helpful to both sides. For Athenians were neither taciturn nor discreet; a wary defendant or his friends could pick up useful hints as to the intentions of the prosecutor both from the conversation of the prosecutor and from that of his friends in the various haunts where citizens were wont to spend much of their leisure time.[3] Hence the frequent appearance of such statements as "I hear that my opponent proposes to say thus and so" or any similar expression. But it is not always safe to assume that every time a litigant uses such language he has actually discovered anything about his opponent's intentions. Anticipation of possible arguments of an opponent was commonly taught in the schools of rhetoric. The practice gave the speaker the advantage of getting the ears of the jury first. If the opponent did not in fact use the anticipated argument, nothing was lost. It might very well be that the refutation was so effective that the argument was abandoned.

A man's enemies were quite ready to help his opponent in litigation by imparting any useful information. For example, Demosthenes received considerable information and encouragement from the enemies of Midias.[4] And there are even cases in which intimate friends of a litigant are said to

[1] iii. 10–12; cf. Dorjahn, *op. cit.*, pp. 278 f.

[2] lvi. 11–14, 21–22.

[3] Lysias xxiv. 19–20; Isoc. xviii. 9.

[4] xxi. 23; cf. Aeschin. ii. 155; Demos. xix. 332; xx. 105.

have divulged to the other side matters which were damaging. Thus Apollodorus accuses his *quondam* friend Nicostratus of betraying him to his opponents in a suit:

> Accordingly, he first conspires against me with my opponents in a lawsuit, and binds himself by oath to support them; after the proceedings had commenced, he discloses to them my case, with which he was acquainted [*τούς τε λόγους ἐκφέρει μου εἰδώς*].[1]

In *Epichares* v. *Theocrines*[2] the plaintiff refers to the desertion to the defendant of men who knew the details of his case. It is also possible that a logograph might betray his client. It was charged by Aeschines that Apollodorus profited by seeing in advance of delivery the speech written by Demosthenes for the defendant in *Apollodorus* v. *Phormio:* "You," said Aeschines to Demosthenes, "wrote a speech for the banker Phormio and were paid for it; this speech you communicated to Apollodorus, who was bringing a capital charge against Phormio."[3] Plutarch[4] not only supports the charge of Aeschines against Demosthenes but says that Demosthenes wrote speeches both for Phormio and for Apollodorus in their litigation with each other. But the speech for Apollodorus in his suit for false testimony against Stephanus, who was a witness for the defendant in *Apollodorus* v. *Phormio*, is not now regarded as the work of Demosthenes.[5]

Another source of aid to litigants was the clubs to which most citizens of standing belonged. Thucydides, in recounting the activities of the oligarchs in the revolution in 411 B.C., says that Peisander achieved co-operation among "the clubs which already existed in the state for mutual support in politics and litigation."[6] Thucydides uses the term *ξυνωμο-*

[1] Demos. liii. 14.

[2] *Ibid.* lviii. 4, 42.

[3] Aeschin. ii. 165.

[4] *Demosthenes* xv.

[5] Schaefer, *Demosthenes und seine Zeit* (1st ed.), III, 2, 184–93. A very convenient and brief discussion of the subject is found in Sandys and Paley, *op. cit.*, II, xxxix ff.

[6] Thuc. viii. 54. 4; this translation closely follows that of Dale. Jowett's "for the management of trials and elections" or Smith's "for the control of courts and officials" carry implications which are not to be found in the Greek: *τάς τε ξυνωμοσίας, αἵπερ ἐτύγχανον πρότερον ἐν τῇ πόλει οὖσαι ἐπὶ δίκαις καὶ ἀρχαῖς.* Grote (*History of Greece*, VIII, 16) described the clubs as "associations, bound together by oath,

σίαι ("sworn associations"), but the older designation is ἑταιρεία. A member of such an association is ἑταῖρος ("companion"). "As early as Homer, ἑταῖροι is used in certain passages of men who are united by a peculiar relationship, distinct from ordinary friendship or ordinary companionship in arms."[1] The activities of the clubs in anti-democratic movements, especially in the revolution of the Four Hundred, naturally lead us to expect that their activities in litigation would be largely unlawful. To some extent this is true, but it is quite clear from Calhoun's investigations that there were plenty of legitimate services an organization of a litigant's friends could render. It is to be noted that references to activities of a club in court are in the very nature of litigation almost certain to concern only those which are unfair or illegal.[2] For example, a client of Isaeus claims that his opponent has brought an action against him, "trusting to his associates and tricky speeches."[3] It is evident that the speaker has in view activities that are not commendable.

One type of service which any member of a club could render would be the service referred to above—the collection of information regarding the manner in which the opponent intended to conduct his case. The club affiliations of a citizen increased materially the number of friends who were on the lookout for hints that would help a litigant to frame his case so as to meet his opponent's attack.

As advocates the club members would be particularly effective because they for the most part belonged to the better classes, and were accustomed to taking part in public business. According to Grote:

> Among these clubs were distributed most of the best citizens, the good and honorable men, the elegant men, the well-known, the temperate, the

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among the wealthy citizens, partly for purposes of amusement, but chiefly pledging the members to stand by each other in objects of political ambition, in judicial trials, in accusation or defense of official men after the period of office had expired, in carrying points through the public assembly, etc."

[1] Calhoun, *op. cit.*, p. 5.

[2] *Ibid.*, p. 40.

[3] Isaeus, *Frag.* xxiii. 2 (Thalheim): πιστεύων δ'ἑταιρείαις καὶ λόγων παρασκευαῖς.

honest, and moderate men etc. to employ that complimentary phraseology by which wealthy and anti-popular politicians have chosen to designate each other, in ancient as well as in modern times.[1]

This view of the membership of the clubs is doubtless partially justified by the decisive part they played in the revolutions of 411 and 404–403 B.C. But Calhoun[2] has shown that the clubs extended beyond the ranks of the oligarchs. Many distinguished democratic leaders from Cleisthenes down were club members. Socrates is represented as saying that men who engaged in public affairs must belong to clubs if they wished to be influential.[3] The fact remains, however, that in any club which concerned itself with politics and litigation there would be a considerable number of men whose services as advocates would be useful and desirable.

Demosthenes, in his speech against Midias, has emphasized the disadvantage under which the poor labor in litigation with the rich:

οὐ μέτεστι τῶν ἴσων οὐδὲ τῶν ὁμοίων, ὦ ἄνδρες Ἀθηναῖοι, πρὸς τοὺς πλουσίους τοῖς λοιποῖς ἡμῖν, οὐ μέτεστιν, οὔ. . . . . καὶ μάρτυρές εἰσιν ἕτοιμοι τούτοις καὶ συνήγοροι πάντες καθ' ἡμῶν εὐτρεπεῖς· ἐμοὶ δ' οὐδὲ τἀληθῆ μαρτυρεῖν ἐθέλοντας ὁρᾶτ' ἐνίους.[4]

Contributions of money would be welcome to most litigants. In spite of the law forbidding advocates to accept fees, advocates could always be hired either directly or indirectly.[5] Money could always be contributed by relatives, friends, and associates. Andocides charges that Callias, wishing to be rid of him for business reasons, gave Cephisius one thousand drachmas to prosecute him for impiety.[6]

The subornation of witnesses would often cost money. Though perjurers ran little risk even if their falsehoods were detected, the public disgrace and partial *atimia* that might follow discovery would enable them to demand money for

[1] *Op. cit.*, p. 16.

[2] *Op. cit.*, pp. 18 f.

[3] Plato *Apol.* 36B–C.

[4] xxi. 112.

[5] For indirect remuneration see the relations of Crito and Archedemus in Xen. *Mem.* ii. 9. 4; cf. Demos. li. 16.

[6] i. 121; cf. 132 for references to other funds collected by the enemies of Andocides.

their services. Thus the notorious witnesses who testified to the death of a woman who was forthwith produced alive and well in court must have received compensation for their testimony.[1]

The poor also suffered if they lost their cases, for litigants who were compelled to pay large sums of money in fines or damages were often in need of ready money to save themselves from ultimate *atimia* if they could not pay by the ninth prytany. It was the acid test of friendship, second only to ransoming a prisoner of war[2] or contributing to the dower of the daughter of an indigent friend, not to fail in such circumstances.[3]

There are indications that in the fifth century efforts were made to influence jurors in a pending suit. In the *Wasps*, Philocleon rejoices in the personal appeals of litigants for his aid as he stands waiting for the court to open:

> Is there any creature on earth more blest,
> more feared and petted from day to day,
> Or that leads a happier, pleasanter life,
> than a Justice of Athens, though old and grey?
> For first when rising from bed in the morn,
> to the criminal court betimes I trudge,
> Great six-foot fellows are there at the rails,
> in anxious haste to salute their Judge.
> And the delicate hand, which has dipped so deep
> in the public purse, he claps into mine,
> And he bows before me, and makes his prayer,
> and softens his voice to a pitiful whine;
> "O pity me, pity me, Sire," he cries,
> "if you ever indulged your longing for pelf,
> When you managed the mess on a far campaign,
> or served some office of state yourself."[4]

[1] Isoc. xviii. 51 ff.; cf. Demos. xxix. 28 for alleged bribery of witnesses. Isaeus v. 8 says of members of a club: *τὰ ψευδῆ ἀλλήλοις μαρτυρεῖν*. Cf. also references to the orators cited by Calhoun, *op. cit.*, p. 81, n. 1; also references in the comic fragments: Menander, *Frag.* 537 (Kock): *τί βούλει; πάντα σοι γενήσεται, ... φίλοι, δικασταί, μάρτυρες*, and Eubulos, *Frag.* 74 (Kock), and Philemon, *Frag.* 65 (Kock).

[2] Antiph. v. 63.

[3] Cf. Demos. liii. 6 ff.

[4] Aristoph. *Wasps* 550 ff. (trans. Rogers).

There are in the sources no examples of this practice of personal appeals made by litigants to jurors before the trial began, but there is an apposite passage in Pseudo-Xenophon showing that suitors from the allied states approached jurors when their cases were about to come before court:

νῦν δ' ἠνάγκασται τὸν δῆμον κολακεύειν τὸν Ἀθηναίων εἷς ἕκαστος τῶν συμμάχων γιγνώσκων ὅτι δεῖ μὲν ἀφικόμενον Ἀθήναζε δίκην δοῦναι καὶ λαβεῖν οὐκ ἐν ἄλλοις τισὶν ἀλλ' ἐν τῷ δήμῳ, ὅς ἐστι δὴ νόμος Ἀθήνησι· καὶ ἀντιβολῆσαι ἀναγκάζεται ἐν τοῖς δικαστηρίοις καὶ εἰσιόντος του ἐπιλαμβάνεσθαι τῆς χειρός.[1]

There is in Antiphon[2] a story of a most irregular procedure to prejudice a jury against a prosecutor on the eve of the trial. A chorus boy in training had been given some medicine for a throat affliction. He died shortly afterward. At first the relatives took no action and imputed no blame to the choregus who was responsible for the care and training of the boys. But it so happened that the choregus had impeached some officials for peculation. The day before the case was to come up for trial in the court of the thesmothetai, Diodotus, the brother of the deceased, was "induced" by the defendants and their friends to charge the choregus with homicide. Time was pressing, so Diodotus, before laying a charge of homicide, went before the jury in the court of the thesmothetai at the end of a session and denounced the choregus as a homicide. The next day he tried to enter the case with the king archon for trial, but the king archon refused to accept the case because there was not sufficient time left of his year of office for completing the preliminary hearings required by law. Thus the plot failed because the choregus could not be excluded from court as a polluted person.[3] It was hoped, however, that the jurors, having heard the story of Diodotus, might be

[1] *Ath. Pol.* i. 18; the *Wasps* was presented in 422 B.C. and the treatise on the constitution appeared about 425 B.C. The similarity of phraseology has been noted by editors of Aristophanes; cf. *Wasps*, 553–55:

. . . . κἄπειτ' εὐθὺς προσιόντι
ἐμβάλλει μοι τὴν χεῖρ' ἁπαλὴν, τῶν δημοσίων κεκλοφυῖαν·
ἱκετεύουσίν θ' ὑποκύπτοντες, τὴν φωνὴν οἰκτροχοοῦντες.

[2] vi. 10–21.

[3] Cf. *infra*, pp. 199 f.

strongly prejudiced against the choregus, who escaped a charge of homicide on a technicality. That this was not the actual result is shown by the conviction of the officials.[1] It would seem that Diodotus made his announcement in an interval between cases or at the end of the court session before the jurors dispersed. In this way interested persons apparently could announce the cases to be tried at the next session of the court.[2]

In the fifth century, when the personnel of a court was fixed for a year, such appeals to jurymen were easy; but in the elaborate system of jury selection in the fourth century, appeals either to individuals or to panels would be difficult if not impossible.[3] Other means were devised to influence public opinion. When Demosthenes was engaged in litigation with the redoubtable Midias, a charge of desertion of military post was brought against Demosthenes by Euctemon. Demosthenes claims that the reason for the suit was that all might see the official notice: "Euctemon of Lusia has indicted Demosthenes of Paeonia for desertion of post."[4] At any rate, the case was never brought to trial. Military offenses were well calculated to arouse hostile public sentiment in which any jury would share. But it was dangerous to bring a groundless or ill-founded criminal charge. In the present case, Euctemon, the prosecutor, was disfranchised for failure to go on with the case. Cases like this are to be distinguished from prosecutions undertaken with the purpose of eliminating an opponent by means of an adverse verdict.[5]

Another means of arousing public sentiment against a man was by means of προβολή (presentment in the ecclesia). In the case of crimes which affected the public interest a prospective prosecutor might bring the matter before the ecclesia

[1] Antiph. vi. 28.

[2] Cf. Aristoph. *Wasps* 242 ff., 687 ff.; *supra*, I, 249. Socrates is represented as talking informally to the jurors on the conclusion of his case (Plato *Apol.* 38C).

[3] Cf. *supra*, I, 367 ff.

[4] xxi. 103.

[5] Calhoun (*op. cit.*, pp. 48 ff.) has a full discussion of all such countersuits.

in the manner provided by law.[1] Both prosecutor and defendant as well as their supporters spoke. The vote was by a show of hands and had no legal effect. It was like a modern resolution of Congress, a mere expression of opinion. But if the vote was against the prosecutor, it was useless to pursue the matter further. He would almost certainly fail to win a verdict in court, and he might even incur a fine for failure to obtain a fifth part of the votes. On the other hand, a favorable action by the ecclesia did not oblige him to take any further action. But if he decided to go on with the case, he had made a public demonstration of the strength of his charge and had public sentiment with him. The jurors, drawn from the membership of the ecclesia, could not fail to be affected by the result of the *probolé*, and the prosecutor might well hope for a favorable verdict in court. It so happens that Demosthenes, though successful with his *probolé* against Midias, did not prosecute him before a heliastic court. Political considerations and a sum of money dissuaded him. However, he prepared a speech for delivery and published it. It is to this speech that we owe our chief knowledge of *probolé*.

No judicial system can function properly without adequate provision for the prosecution of public offenders. Athenians were quite aware of the importance of criminal prosecutors. Lycurgus, himself perhaps the most conscientious and severe prosecutor in Athenian legal history, says:

> The three most important provisions for guarding and preserving democracy and the welfare of the state are the established laws, the legal processes, and the verdicts of the courts. For it is the function of the law to proclaim what ought not to be done, of the accuser to denounce those who are liable to the penalties prescribed by law, and of the judge to punish those who are thus brought to justice. Consequently neither the law nor the verdict of the judge is of any avail without someone to bring offenders to justice.[2]

Solon provided for freedom of prosecution to insure the enforcement of his own laws in the interest of the masses. Any-

[1] Lipsius (*op. cit.*, pp. 211 ff.) has a full and satisfactory discussion of all phases of προβολή as a process. He makes no comment on its use in the strategy of litigation.

[2] i. 3–4.

one who wished (*ὁ βουλόμενος*) might intervene and prosecute a wrongdoer whether he had himself suffered from the wrongdoing or not. It is commonly said that in Athens there were no public prosecutors, only volunteers. In theory this is true, for in the normal administration of criminal justice Athens relied wholly upon volunteer accusers. But where the public interest was particularly involved, chosen advocates were employed. Solon himself had been chosen to represent the state in an arbitration with Megara regarding the ownership of Salamis.[1]

The best-known case in which public advocates were employed in the fifth century was the trial of Cimon. In 463 B.C., Cimon was charged with accepting bribes from King Alexander of Macedon. The accusation was made at his audit, according to Aristotle,[2] and Pericles *κατηγόρησε τὰς εὐθύνας Κίμωνος στρατηγοῦντος νέος ὤν*. Plutarch[3] says that the matter came up before a court (*πρὸς τοὺς δικαστάς*). But Plutarch's statements indicate that it was first broached in the assembly by his "enemies who formed a coalition against him" (*τῶν ἐχθρῶν συστάντων ἐπ' αὐτόν*). In his life of Pericles,[4] Plutarch says that Pericles was chosen by the people as one of Cimon's accusers: *ἦν μὲν γὰρ εἷς τῶν κατηγόρων ὁ Περικλῆς ὑπὸ τοῦ δήμου προβεβλημένος*. Elpinice, sister of Cimon, is said to have approached Pericles as the most aggressive (*σφοδρότατος*) prosecutor of her brother with a plea on his behalf. Dismissing her with a smile and a jest, Pericles "at the trial was very gentle with Cimon and performed his task in a perfunctory manner."[5] According to the account of Plutarch, the charge against Cimon came up in the assembly by way of an *εἰσαγγελία* where Pericles pressed the matter vigorously. The case was referred to a court with elected prosecutors. In the interval between the proceedings in the assembly and those in the court Elpinice interceded with Pericles, the most

[1] Plut. *Solon* x. It was on this occasion that Solon is said to have quoted two lines interpolated into the Catalogue of Ships to support the Athenian claims.

[2] *Ath. Pol.* xxvii. 1. [3] *Cimon* xiv. 3. [4] x. 5.

[5] Plut. *Cimon* xiv: *πλὴν ἔν γε τῇ δίκῃ πραότατον γενέσθαι τῷ Κίμωνι καὶ πρὸς τὴν κατηγορίαν ἅπαξ ἀναστῆναι μόνον, ὥσπερ ἀφοσιούμενον.*

dangerous of the prosecutors. Technically Aristotle is in error in calling the case εὔθυνα. The audits of generals were different from those of other officials. Their official acts could be dealt with not only in the regular audit but also by εἰσαγγελία or ἐπιχειροτονία.[1] It need occasion no surprise that Aristotle in a mere reference to the trial should use εὔθυνα in a broad sense in referring to a trial involving the official conduct of a general. Isocrates is guilty of the same confusion regarding the εἰσαγγελία of Timotheus which he calls εὔθυνα.[2]

Another well-known criminal case in which public prosecutors participated is that of Antiphon and Archeptolemus, who were tried for treason (προδοσία) in 411 B.C. The matter came before the boulé by way of information from the generals. The decree of the senate providing for the trial is quoted from Caecilius by Pseudo-Plutarch.[3] This was really an εἰσαγγελία which the boulé disposed of without reference to the ecclesia. The generals were instructed to arrest and produce the alleged traitors in court for trial and to prosecute them with the aid of any ten members of the boulé they chose (οὕστινας ἂν δοκῇ τοῖς στρατηγοῖς προσελομένοις μέχρι δέκα). The selection was authorized by the decree of the boulé but the method of selection was left to the generals. As usual, volunteers were invited to share in the prosecution (κατηγορεῖν [δὲ] τοὺς ᾑρημένους συνηγόρους καὶ τοὺς στρατηγοὺς καὶ ἄλλος ἄν τις βούληται).

The frequent mention of public advocates in the literature and their evident unpopularity point to their widespread use. In some cases the kind of trial in which they were employed can with reasonable certainty be recognized. It has been inferred from a passage in Aristophanes' *Wasps* that advocates were employed in γραφὴ καταλύσεως τοῦ δήμου.[4] Bdelycleon is arguing with the chorus, who wish him to permit his father

[1] Cf. Wilamowitz, *Aristoteles und Athen*, II, 243 ff.; Lipsius, *op. cit.*, pp. 294 ff.

[2] Isoc. xv. 129; cf. Wilamowitz, *op. cit.*, II, 251.

[3] *Vita Antiphontis* xxiii.

[4] 482–83; Gilbert, *Beiträge zur innern Geschichte Athens*, p. 88; cf. Starkie, *ad loc.* and Excursus VII.

to join them and proceed to the court where they are to sit. He proposes a conference which they scornfully reject, calling him an enemy of democracy (*μισόδημος*), a lover of tyranny (*μοναρχίας ἐραστής*), a pro-Spartan, and a sympathizer with Brasidas.[1] They warn him that soon he will be brought to trial on these charges and be denounced as a conspirator (*ξυνωμότης*) by an advocate (*συνήγορος*). Aristophanes chooses here to represent the advocate as being the real prosecutor, as indeed was frequently the case.

There is also in Aristophanes[2] a reference to a trial of Laches which is the first on the docket in the court in which Philocleon and his fellow-dicasts in the chorus were to sit that day.[3] Cleon was to be the prosecutor and the son of Chaereus the advocate who notified the dicasts to be on hand betimes.[4] There is no immediate indication of the nature of the case. The words "everybody says he has a hive of money"[5] point to embezzlement of public moneys. Wilamowitz[6] regards the Trial of the Dog[7] as a burlesque of the trial of Laches scheduled for the day. It is a clever conceit to contrive that the first case tried in the domestic court by the fireside should reflect more or less accurately the recent *εὔθυνα* of the general Laches. The defendant is a dog named Labes of Aexone. The name Labes thinly veils the name of Laches, who was also an Aexonean. At the same time the name involves a pun on *λαμβάνω* which is quite appropriate in a trial for peculation. The audience is left in no doubt as to the identity of the prosecutor, an unnamed dog, *Κύων* from Cydathene, Cleon's own deme.[8] That the trial had to do with an audit seems clear from the words *ἐγὼ δ' ἐβουλόμην ἂν οὐδὲ γράμματα, ἵνα μὴ κακουργῶν ἐνέγραφ' ἡμῖν τὸν λόγον*, "I wish that he had never learned to write that he might not have

[1] *Wasps* 474–76.

[2] *Ibid.* 240 ff.

[3] Dracontides was also to be tried (*ibid.* 157).

[4] *Ibid.* 686 ff.; cf. 242–43.

[5] *Ibid.* 241.

[6] *Op. cit.*, II, 244.

[7] *Wasps* 890 ff.

[8] Cf. Starkie, note on *ibid.* 895; in the *Knights* 1023 Cleon calls himself *κύων* (public watchdog).

sent in falsified accounts to our hurt."[1] Cleon, the prosecutor in the guise of a dog, merely opens the case. The real prosecutor is Xanthias the advocate.[2]

In the *Acharnians* there is a bitter and moving complaint of the older men who are haled into court and convicted by youthful advocates skilled in the artifices of the new rhetoric:

> οἱ γέροντες οἱ παλαιοὶ μεμφόμεσθα τῇ πόλει.
> οὐ γὰρ ἀξίως ἐκείνων ὧν ἐναυμαχήσαμεν
> γηροβοσκούμεσθ' ὑφ ὑμῶν, ἀλλὰ δεινὰ πάσχομεν,
> οἵτινες γέροντας ἄνδρας ἐμβαλόντες ἐς γραφὰς
> ὑπὸ νεανίσκων ἐᾶτε καταγελᾶσθαι ῥητόρων
>
> . . . . . .
>
> ὁ δὲ νεανίας ἑαυτῷ σπουδάσας ξυνηγορεῖν
> ἐς τάχος παίει ξυνάπτων στρογγύλοις τοῖς ῥήμασι·
> κᾆτ' ἀνελκύσας ἐρωτᾷ, σκανδάληθρ' ἱστὰς ἐπῶν,
> ἄνδρα Τιθωνὸν σπαράττων καὶ ταράττων καὶ κυκῶν.[3]

The affected style of the youthful advocates is freely criticized by Aristophanes.[4] In the *Knights*, when old man Demus repents of his former mistakes (ἁμαρτίαις), the sausage-seller reassures him as follows:

> You're not to blame; pray don't imagine that.
> 'Twas they who tricked you so. But answer this;
> If any scurvy advocate should say,
> "Now please remember, justices, ye'll have
> No barley, if the prisoner gets off free,"
> How would you treat that scurvy advocate?
>
> DEMUS: I'd tie Hyperbolus about his neck,
> And hurl him down into the Deadman's Pit.[5]

Philemon the Younger says bitterly that physicians and advocates alone can slay with impunity: μόνῳ δ'ἰατρῷ τοῦτο καὶ συνηγόρῳ ἔξεστι, ἀποκτείνειν μὲν ἀποθνῄσκειν δὲ μή.[6]

[1] *Wasps* 960–61; the error of the scholiast in interpreting these lines has long misled commentators; ὡς γραπτὸν δεδωκότος λόγον τοῦ ἀπολογουμένου κυνός; cf. Wilamowitz, *op. cit.*, II, 244–45, and Starkie's elaborate note on the passage.

[2] *Wasps* 903 ff.

[3] Aristoph. *Acharnians* 676–80, 685–88.

[4] *Frag.* 198 (Kock); for words ending in -ικος which were affected by students of the new rhetoric cf. *Knights* 1375 ff.; *Wasps* 1209; *Clouds* 747, 1172–73; Peppler, *AJP*, XXXI, 428–44.

[5] 1356–63 (trans. Rogers).

[6] *Frag.* 3 (Kock).

In modern communities the embezzlement and misappropriation of public funds by officials do not normally attract more public attention than do murders, kidnappings, divorces, and dishonest financial operations by which the investing public is robbed. In Athens, however, the financial dishonesty of officials was the type of crime that attracted by far the most attention. In the *Wasps*,[1] Philocleon expatiates upon the joy of listening to the piteous and tearful pleas of the defendant's children to the dicasts to pass their father's accounts (*τῆς εὐθύνης ἀπολῦσαι*). In an earlier passage Philocleon tells what delight he takes in his importance when prominent persons (*μεγάλοι καὶ τετραπήχεις*) try to win his sympathy as he waits for the opening of the court.[2] In still another passage Philocleon imagines that some *ὑπεύθυνος* has bribed the cock that woke him for his daily duty in court:

> The cock which crew from eventide, he said,
> Was tampered with, he knew, to call him late,
> Bribed by officials whose accounts were due.[3]

In view of the importance of prosecution of dishonest officials one might well expect that steps would be taken to safeguard the public interest by appointing public advocates in trials of this kind. It has been suggested that the old men in the *Acharnians*[4] who were haled into court and fined by a youthful advocate were prosecuted for financial dishonesty.[5] These "treasury prosecutions" originated with officials chosen by lot. Thus there was no continuity of authority in the same hands. Consequently the real work of the treasurers was handled by subordinate officials, viz., secretaries and undersecretaries.[6] In one instance two men engaged in the

[1] Aristoph. *Wasps* 570 ff.

[2] *Ibid.* 554–57; cf. *supra*, pp. 22, 23, n. 1, where the passage has been quoted for another purpose.

[3] *Ibid.* 100–102; for other references to *ὑπεύθυνοι* see *Knights* 258–60, 823–27; *Peace* 1185–88; *Acharnians* 983.

[4] Aristoph. *Acharnians* 676 ff.

[5] Müller-Strübing, *Aristophanes und die historische Kritik*, p. 323.

[6] To these Müller-Strübing adds sycophants such as Ctesias in *Acharnians* 839. Just why sycophants should be classed with secretaries he does not make clear.

prosecution are mentioned, Cephisodemus[1] and Euathlus. Cephisodemus is denominated "advocate." Euathlus is not so denominated in the present passage but elsewhere he appears as an advocate:

> ἔστι τις πονηρὸς ἡμῖν τοξότης συνήγορος
> ὥσπερ Εὔαθλος . . . . παρ' ὑμῖν τοῖς νέοις.[2]

With the case of Thucydides in the *Acharnians*,[3] Müller-Strübing associates a passage in the *Wasps*[4] in which Bdelycleon maintains that the dicasts are really the dupes of the prosecutors. While they think they are themselves deciding the case, the prosecutors, bribed by the defendant, contrive to get him off. No matter if the "advocate" comes late for court he gets his fee just the same.

> And if one of the defendants give him a bribe he shares it with someone in office associated with him in the case [καὶ κοινωνῶν τῶν ἀρχόντων ἑτέρῳ τινὶ τῶν μεθ' ἑαυτοῦ] and the two of them concert the matter and make a show of zeal, while like a couple of sawyers they play into each other's hands [ξυνθέντε τὸ πρᾶγμα δύ' ὄντε ἐσπουδάκατον, κᾆθ' ὡς πρίονες ὁ μὲν ἕλκει, ὁ δ' ἀντενέδωκε]. But you gape at the paymaster and don't see what is going on.

According to Müller-Strübing, the official associated with the advocate is a secretary or undersecretary who is the technical prosecutor in the case. Starkie says: "The scribes formed a separate class at Athens. They had enormous power, since, being permanent officials, they had a thorough knowledge of the working of the constitution, and the various lot-appointed Boards had to depend on them for information."[5] Starkie is wrong in thinking that there was a class of professional secretaries who passed from board to board. Ferguson says:

> There was no possibility of there existing at Athens such a thing as a professional class of secretaries; for no individual could hold the office more

[1] Aristoph. *Acharnians* 705: τῷδε τῷ Κηφισοδήμῳ τῷ λάλῳ ξυνηγόρῳ.

[2] Aristoph. *Frag.* 411 (Kock).

[3] 703 ff. [4] 686 ff.

[5] *Op. cit.*, Excursus VII; Starkie is following Müller-Strübing, *op. cit.*, and Caillemer in Daremberg-Saglio, *s.v.* "Grammateis."

than twice in a period of twenty years, and, as a matter of fact, in the whole period of Athenian history, there is not a single instance of the same person holding the office a second time.[1]

This statement of Ferguson definitely rules out the secretaries as civil servants with a more or less permanent tenure of office. But without officials with more familiarity with finance and government than could be acquired by boards and secretaries selected by lot for one term only, it is difficult to see how so-called treasury prosecutions could be effectively handled. These actions had to be based upon the records of boards and treasurers. Naturally some official had to furnish the information and take the initiative. It is to such an official that Aristophanes refers in the *Wasps*.[2] The loose use of the word *ἀρχόντων* need occasion no concern, as Müller-Strübing points out.[3] It may be suggested here that the requisite professional knowledge and continuity in office may be found in the undersecretaries who could advise their superiors in technical matters connected with their office.[4] It may very well be that for this reason the *ὑπογραμματεῖς* were very unpopular, as Starkie remarks. *ἡ πόλις ἡμῶν ὑπογραμματέων ἀνεμεστώθη, καὶ βωμολόχων δημοπιθήκων, ἐξαπατώντων τὸν δῆμον ἀεί.*[5] Both Lysias and Demosthenes mention the office with scorn.

And yet from a slave he has become a citizen, and has exchanged beggary for wealth and the position of underclerk for that of lawgiver! And here one might even make it an accusation against you that, whereas your ancestors chose as lawgivers Solon, Themistocles, and Pericles, in the belief that the laws would accord with the character of their makers, you have chosen Teisamenus, son of Mechanion, and Nicomachus, and other persons who were underclerks [*ὑπογραμματέας*]; and although you feel that the magistracy is depraved by people of this sort, it is just these men who have your confidence. Most extraordinary of all, though it is not permissible for the same man to act twice as underclerk to the same magistracy [*ὑπογραμματεῦσαι μὲν οὐκ ἔξεστι δὶς τὸν αὐτὸν τῇ ἀρχῇ τῇ αὐτῇ*], you author-

[1] *Athenian Secretaries*, "Cornell Studies in Classical Philology," VII, 36.

[2] 692.

[3] *Op. cit.*, p. 338.

[4] Cf. Vinogradoff, *Outlines of Historical Jurisprudence*, II, 82 ff.

[5] Aristoph. *Frogs* 1083 ff.

ize the same persons to have control over the most important affairs for a long period.[1]

It is true that there was a restriction upon the employment of the same man as ὑπογραμματεύς twice by the same board, but this did not prevent their passing from board to board and in this way becoming professional. This dislike and jealousy of the ὑπογραμματεῖς is due no doubt to the fact that while they may not have appeared officially, it was well known that they furnished the ammunition for the prosecution.

The simile of the sawyers[2] has caused the commentators some difficulty. Two men at either end of a crosscut or ripsaw achieve their purpose by giving and taking the saw in turn and so their task is accomplished. There is no need to suppose that the sawyers represent the prosecution and the defense.[3] All that is meant is that the prosecutor and his advocate, bribed by the defense, co-operate to secure an acquittal instead of a condemnation.[4] Bribery both of officials and of prosecutors is mentioned in the fourth century also.[5]

The relation of the paid advocate to undersecretaries and other minor officials is a matter of interest. It is obvious that in many cases the success of a prosecution could not be left to the doubtful forensic ability of an underofficial, or to the chance appearance of volunteer prosecutors. A simple solution was to secure the services of a paid advocate. Pericles was appointed by the ecclesia as one of the prosecutors of Cimon. This is what is to be expected in cases of high crimes and misdemeanors which involve the public interest. And in the *Acharnians*, where is pictured the fate of the old man

[1] Lysias xxx. 27–28; cf. Demos. xix. 200, 237, 249; Antiph. vi. 49.

[2] Aristoph. *Wasps* 693–94.

[3] Müller-Strübing, *op. cit.*, p. 337.

[4] In the prosecution of Cimon, Pericles was an elected public advocate and played into the hands of the defense by handling the case in a perfunctory manner. Here there is no question of bribery by the defense; Pericles was influenced by the pleas of Elpinice, the sister of Cimon (Plut. *Pericles* x. 5; cf. *supra*, pp. 26 f).

[5] Cf. Lysias xx. 10; Aeschin. i. 107: λογιστὴς γὰρ γενόμενος πλεῖστα μὲν τὴν πόλιν ἔβλαψε δῶρα λαμβάνων παρὰ τῶν οὐ δικαίως ἀρξάντων.

baited and harried in court by a youthful advocate skilled in rhetoric, the remedy proposed is that the ecclesia shall take action:

> ψηφίσασθε χωρὶς εἶναι τὰς γραφάς, ὅπως ἂν ᾖ
> τῷ γέροντι μὲν γέρων καὶ νωδὸς ὁ ξυνήγορος,
> τοῖς νέοισι δ' εὐρύπρωκτος καὶ λάλος χὠ Κλεινίου.[1]

Just what did the proposed action contemplate? It might mean a plea that on each occasion when an advocate was to be appointed care should be taken to see that "the youngster sue the youngster and the old man sue the old."[2] But since this is comedy it may be a suggested bit of legislation governing the choice of advocates elsewhere than in the ecclesia. It will be recalled that in the trial of Antiphon the boulé authorized the generals to choose any ten members of the boulé as advocates. In the passage in the *Acharnians*[3] the young man is said to have secured his appointment by intrigue (σπουδάσας). This may very well refer to an appointment by the ecclesia, determined by politicians or engineered by the clubs which were interested in politics and litigation.[4] It is not impossible that boards might appoint their own advocates for treasury prosecutions. Some color is given to this conjecture by the fourth-century practice of appointing by lot ten advocates to assist the *logistai* in auditing the accounts of retiring officials. It may be that in the thoroughly democratized constitution of the fourth century some of the appointed advocates of the fifth century are now chosen by lot.

There are two kinds of accounting. The cripple in Lysias[5] reminds the council that he is not before them accounting for public moneys (λόγον δίδωμι) officially expended, nor undergoing an inquiry (εὐθύνας ὑπέχω) into other official acts while in office. The first kind of accounting (λόγον διδόναι) was required only of those officials who expended public funds.[6]

[1] Aristoph. *Acharnians* 714–16. [2] *Ibid.* 718. [3] 685.

[4] Thuc. viii. 54; cf. *supra*, pp. 19 ff. In the *Wasps* 687 ff., Chaereus, a henchman of Cleon, is the advocate who notifies the dicasts to be on hand next day betimes.

[5] xxiv. 26.

[6] Officials who did not handle public funds were required to file a statement to that effect; cf. Aeschin. iii. 22: Ἀλλ' ἔστι τις ἄνθρωπος ὃς οὔτ' εἴληφεν οὐδὲν τῶν

The officers in charge of the financial audit and all charges connected with it were the ten *logistai* and ten *synegoroi* chosen by lot. It is the functions of the *synegoroi* that are of immediate concern. On receiving the accounts these two groups of officers checked them with the appropriate official records. This investigation which the ὑπεύθυνοι attended was in the nature of an *anakrisis*. In fact, an ancient source says:

> Ἀριστοτέλης ἐν τῇ Ἀθηναίων πολιτείᾳ οὕτω λέγει· λογιστὰς δὲ αἱροῦνται δέκα παρ' οἷς διαλογίζονται πᾶσαι αἱ ἀρχαὶ τά τε λήμματα καὶ τὰς γεγενημένας δαπάνας καὶ ἄλλους δέκα συνηγόρους, οἵτινες συνανακρίνουσι τούτοις· καὶ οἱ τὰς εὐθύνας διδόντες παρὰ τούτοις ἀνακρίνονται πρῶτον, εἶτα ἐφίενται εἰς τὸ δικαστήριον εἰς ἕνα καὶ πεντακοσίους.[1]

Besides the financial accounts these officers investigated all indictments of offenses which were punishable by a fine, such as embezzlement (κλωπῆς), accepting bribes (δώρων), and maladministration (ἀδικίου). Whether the *logistai*, advised by the *synegoroi*, found any shortcomings in the audit or not, they had to bring the ὑπεύθυνος into a court of 501 dicasts presided over by themselves for a final discharge or a trial as the case might be. In a trial the *synegoroi* acted as official prosecutors.[2] If the court confirmed the discharge it was sealed with the state seal.[3] In the trial volunteer accusers were invited to participate.[4]

It is strange to find in the Athenian system provision made for allotted public prosecutors even in one class of cases. The lot was surely a poor way to select a competent lawyer. But

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δημοσίων οὔτ' ἀνήλωκε, προσῆλθε δὲ πρός τι τῶν κοινῶν . . . . αὐτὸς ὑποβάλλει καὶ διδάσκει ὁ νόμος ἃ χρὴ γράφειν· κελεύει γὰρ αὐτὸ τοῦτο ἐγγράφειν, ὅτι οὔτ' ἔλαβον οὐδὲν τῶν τῆς πόλεως οὔτ' ἀνήλωσα.

[1] *Lex. Cant.*, p. 20, *s.v.* λογισταὶ καὶ συνήγοροι. This note cannot have been drawn entirely from the corresponding treatment of λογισταί in Arist. *Ath. Pol.* liv. 2. Lipsius (*op. cit.*, p. 104, n. 201) observes: "Der letztere Zusatz stammt aus anderer Quelle, verdient aber darum nicht minder Glauben."

[2] Lipsius, *op. cit.*, p. 104; Wilamowitz, *op. cit.*, II, 232; Gilbert, *Const. Antiqu.*, p. 227.

[3] Demos. xviii. 250; cf. Bonner, "The Use and Effect of Attic Seals," *CP*, III, 401–2.

[4] Aeschin. iii. 23.

the situation in regard to the audit was unusual. Only a careful scrutiny of accounts could disclose irregularities. If irregularities were discovered, how was the official to be punished? Obviously the power of determining the matter could not be left to the *logistai* or any other board. It must come before a court. It was the rule that magistrates and boards presided in trials that concerned matters which fell within their own jurisdiction. Consequently they could not both preside and prosecute. No citizen could be expected to prosecute such cases without a knowledge of the details of the examination made by the *logistai* unless they were published. To this there are obvious objections. The difficulty was met by associating with the *logistai* a similar group called *synegoroi* to assist and advise the *logistai* in reaching a decision. In case of a public trial the *synegoroi* were in an excellent position to prosecute the alleged offender. In fact, no one else could deal effectively with the case. There was little risk in intrusting a prosecution to an inexperienced citizen. He need only introduce the case and trust to volunteer assistants to push the case effectively. Moreover, it must not be forgotten that citizens had the right to present themselves for allotment to office,[1] and that men suitable for the task of handling cases in court might very well have sought the office of *συνήγορος*. In any event we may be sure that no serious practical difficulties developed, for the system worked for many years.

In the fourth-century literature there is no mention of elected public advocates in the types of cases in which they served in the fifth century.[2] This situation is probably to be explained partly by the existence of allotted advocates for the prosecution of dishonest officials and partly by the general dislike of paid public advocates reflected in the comedies. The new democracy refused to employ special counsel as undemocratic. There were exceptions, however. Hyperides twice represented Athenian interests abroad. In a dispute be-

[1] Isoc. xv. 150; Lysias vi. 4; xxxi. 33.

[2] Lipsius, *op. cit.*, p. 206, n. 97.

tween Delos and Athens regarding the management of the temple of Apollo in Delos, Hyperides was chosen by the Areopagus to present the Athenian case before the Amphictyonic Council.[1] He was also chosen by the city to defend an Athenian athlete who was charged with a foul at the Olympic games.[2] In the Harpalus affair he appears with nine other public advocates. When Harpalus, the absconding treasurer of Alexander, escaped from Athens it was said that prominent Athenians had received substantial bribes from him. A commission of Areopagites was appointed to investigate the matter. The report of the commission (ἀπόφασις) charged nine public men with receiving bribes. The name of Demosthenes headed the list. Prosecutions were launched by action of the ecclesia and ten advocates were appointed to prosecute. Demosthenes was convicted. The speech of one of the public advocates, Hyperides, against Demosthenes is extant, as also are speeches of Dinarchus against Demosthenes, Philocles, and Aristogiton.[3]

In the matter of repealing or revising laws the court of revision consisted of five hundred citizens drawn from the dicasts under the presidency of the thesmothetai. Any citizen could appear for or against the proposed legislation but the ecclesia always selected five advocates to defend the old laws.[4] Men whose names were stricken from the citizen rolls of the demes for any reason had a right of appeal to the ecclesia. In these cases the deme was represented by the demarch and five chosen prosecutors.[5] A tribe might also choose advocates in the tribe assembly to support one of its members. Thus

[1] Hyper. *Frag.* xix (Kenyon); Demos. xviii. 134; cf. *supra*, I, 364.

[2] Paus. v. 21. 5 ff.

[3] For the procedure in such cases see *supra*, I, 364. For the accounts of the Harpalus affair cf. Plut. *Moralia* 846B–C; 848F; *CAH*, VI, 450 ff.

[4] Cf. Plato *Crito* 50B; the law cited in Demos. xxiv. 23 provides for the selection of five advocates, but in Demos. xx. 146 only four advocates are named. Kahrstedt, in Pauly-Wissowa, *s.v.* Σύνδικος, suggests that Leptines himself was the fifth.

[5] Arist. *Ath. Pol.* xlii. In other litigation also in which the deme interests were involved advocates acted; cf. Gilbert, *op. cit.*, p. 207; Chapot, in Daremberg-Saglio, *s.v.* "Syndicus."

the tribe sent advocates to assist Andocides when tried for impiety in 399 B.C.[1]

These instances show that the state, as represented by the boulé or the ecclesia or possibly financial boards, employed counsel in important cases as did also the deme, and the tribal, assemblies. But in spite of the law forbidding the same man to serve on more than one case,[2] Hyperides is known to have served on three occasions. It is significant that even where special prosecutors were employed the right of volunteers to appear was always acknowledged.

The practice of using elected advocates in public cases is reflected in private practice. A volunteer prosecutor was often aided by others. The chief prosecutor laid the indictment but all spoke. Thus Meletus indicted Socrates,[3] but Anytus and Lycon also delivered speeches. Similarly, Andocides was accused by Cephisius, assisted by four others among whom was Meletus. Andocides was supported by Cephalus and Anytus. The latter may be the same Anytus who helped to prosecute Socrates.[4] Both of these cases were tried in 399 B.C.

[1] Quite a different type of σύνδικοι were those elected by vote for a number of years after the restoration of democracy in 403 B.C. to handle cases arising out of claims to confiscated property or other property cases where the state was the interested party. A good example of the kind of suit in which these σύνδικοι acted is Lysias xvii; cf. xviii. 26; xix. 32. Lipsius (*op. cit.*, p. 115) properly classifies them as *ausserordentliche Behörden*.

[2] Demos. xx. 152.

[3] Plato *Euthyphro* 2B.

[4] Judeich, in Pauly-Wissowa, *s.v.* "Anytos" 3.

CHAPTER III

SYCOPHANTS

Solon permitted any qualified citizen to prosecute wrongdoers to enable the members of the lower classes to protect themselves in their newly granted rights and privileges.[1] He intended by this momentous measure "to accustom citizens like members of the same body to be sensible of and to resent one another's injuries." Solon believed that the best-governed state[2] was that in which those who had suffered no wrong were as diligent in prosecuting and punishing the wrongdoers as those who had suffered wrong. In a large measure Solon's hopes were justified. Athens developed high ideals of citizenship. There was apparently no lack of prosecutors, for several were often associated in the same case. Socrates, for example, and Andocides were both prosecuted for impiety in 399 B.C., and in each case there were three prosecutors. Public opinion approved of those who served the city zealously and criticized those who failed to take their share of public responsibility. "We alone," says Pericles, "regard the man who takes no part in public affairs not as one who minds his own business, but as good for nothing."[3] Demosthenes makes a strong point of the persistent failure of two politicians to do their duty as prosecutors of men who had wronged the city:

> How comes it then, Timocrates and Androtion, when it is more than thirty years since one of you commenced his political career, and in that period many generals have wronged the republic, and many orators too, who have been tried before your countrymen, and some of whom have suffered death for their crimes, while others withdrew into exile, which was an act of self-condemnation—how comes it that neither of you ever ap-

[1] Arist. *Ath. Pol.* ix.

[2] ἥτις οἰκεῖται κάλλιστα τῶν πόλεων (Plut. *Solon* xviii. 5).

[3] Thuc. ii. 40. 2.

peared as the accuser of any of them, or ever was seen to express indignation at the wrongs of the state?[1]

Certain types of wrongdoing affected the public only in the person of an individual. Common examples are slander, robbery, assault, and battery. In these and other such cases the aggrieved parties could usually be counted upon to bring the offender to justice. This would particularly be the case after the development of rhetoric, when injured persons could use the services of professional speech-writers to assist them in the prosecution.

Prosecutors are sometimes at pains to stress their patriotism and public service. "I consider it the duty of a good citizen to undergo dangers for the democracy and not to keep quiet about public matters for fear of incurring personal enmity," says Andocides.[2] Aeschines observes:

> When I saw that the city was being seriously injured by the defendant, Timarchus, who, though disqualified by law, was speaking in your assemblies, and when I myself was made a victim of his blackmailing attack . . . . I decided that it would be a most shameful thing if I failed to come to the defence of the whole city and its laws, and to your defence and my own.[3]

It will be observed that the speaker admits his own personal interest in having the defendant punished because he had personally suffered at his hands. But the best-recorded expression of a citizen's duty to prosecute wrongdoers is found in Lycurgus, that uncompromising enemy of all public wrongdoers. "In aid of my native land and the temples and the laws I have brought this case [ἀποδέδωκα τὸν ἀγῶνα] as I should, justly and honestly."[4] The significance of the prefix ἀπο in the phrase ἀποδέδωκα τὸν ἀγῶνα marks his action as a debt or a duty which he owed the city, as Lofberg points out.[5]

More substantial encouragement was offered volunteers by granting them a liberal share of fines, confiscations, and moneys recovered for the treasury by prosecutors in certain

[1] Demos. xxiv. 173 (trans. Kennedy).

[2] iv. 1. [3] i. 1–2. [4] i. 149.

[5] *Sycophancy in Athens*, p. 2.

types of action, namely, "denunciation" (*φάσις*), "inventory" (*ἀπογραφή*), and prosecutions for usurpation of citizen rights (*γραφαὶ ξενίας*). *Φάσις* was used against those who contravened laws and regulations regarding commerce, customs, and mining, and against guardians who mismanaged the property of their wards. Anyone who cut down more than the number of olive trees permitted by law could also be prosecuted by *φάσις*. The successful prosecutor received one-half of the value of the property confiscated or of the fine levied. No forensic speech deals with a case of *φάσις*.[1]

The most common use of *ἀπογραφή* was to recover state property that was unlawfully in the possession of individuals, e.g., the relatives of a man whose property was confiscated, or a state debtor. The successful prosecutor received three-fourths of the property recovered.[2]

Athenians were extremely jealous of the rights of citizenship. The notorious case of *Theomnestus* v. *Neaera* is a *γραφὴ ξενίας*. The laws protecting Athenian citizenship from usurpation are cited in full in this speech:

ἐὰν δὲ ξένος ἀστῇ συνοικῇ τέχνῃ ἢ μηχανῇ ἠτινιοῦν, γραφέσθω πρὸς τοὺς θεσμοθέτας Ἀθηναίων ὁ βουλόμενος, οἷς ἔξεστιν. ἐὰν δὲ ἁλῷ, πεπράσθω καὶ αὐτὸς καὶ ἡ οὐσία αὐτοῦ, καὶ τὸ τρίτον μέρος ἔστω τοῦ ἑλόντος. ἔστω δὲ καὶ ἐὰν ἡ ξένη τῷ ἀστῷ συνοικῇ, κατὰ ταὐτά, καὶ ὁ συνοικῶν τῇ ξένῃ τῇ ἁλούσῃ ὀφειλέτω χιλίας δραχμάς.[3]

The prosecutor, if successful, obtained one-third of the fine inflicted, or of the proceeds of the sale of the person or property of the alien defendant.

Such motives on the part of volunteer prosecutors as public spirit and the expectation of legitimate financial gain are highly praiseworthy. But, strangely enough, Athenian public opinion not only tolerated but approved political and personal motives as well. Prosecution in the courts was a

[1] For a discussion of the problems involved cf. Lipsius, *Das Attische Recht*, pp. 309 ff. Lofberg (*op. cit.*, pp. 26 ff.) has fully discussed this form of action as employed by sycophants. For the statement of Pollux that *φάσις* could be used against sycophants cf. *infra*, p. 71.

[2] Cf. Lipsius, *op. cit.*, pp. 299 ff.; Lofberg, *op. cit.*, pp. 28 ff. A modern parallel to this type of case would be the action against a bankrupt for concealment of assets.

[3] Demos. lix. 16; cf. Lofberg, *op. cit.*, pp. 31 f.; Lipsius, *op. cit.*, pp. 416 ff.

well-recognized means of vengeance on one's enemies. Prosecutors readily avowed in court their personal hostility to the defendant.[1] It was only when men made a profession of prosecution for financial gain that public opinion was hostile. Such persons were known as "sycophants." The English word is a mere transliteration of the Greek *συκοφάντης*. The original significance of the word has been a matter of dispute since the time of Plutarch.[2] The words *συκοφάντης* and *συκοφαντέω* occur commonly enough in the orators, but it is very difficult to extract a satisfactory legal definition from the ancient sources. A client of Demosthenes says: "A sycophant is one who brings all kinds of charges and proves none."[3] This suggests the false accuser. A client of Lysias adds the notion of blackmail: "It is their practice to bring charges even against those who have done no wrong. For from these they would gain most profit."[4] In the same vein is a statement of Isocrates: "They advertise their powers in their attacks upon men who are entirely innocent and so get more money from those who are clearly guilty."[5] Lysias[6] refers to the Thirty as sycophants, though their first measure was to execute a number of sycophants. Here *συκοφάνται* is equivalent to *πονηροί*. The sycophant is the *πολυπράγμων*. For English readers Kennedy, himself a lawyer, has brought out the various implications of *συκοφάντης*: Such a man, he says, was "a happy compound of the common barretor, informer, pettifogger, busybody, rogue, liar and slanderer."[7] "It included calumny and conspiracy, false accusation, malicious prosecution, threats of legal proceedings to extort money, and

[1] Lysias xiii. 1; xiv. 1–2; Demos. xxiv. 7–8.

[2] For the various suggestions cf. Lofberg, *op. cit.*, pp. vii–viii; Murley, *CP*, XVI, 199; Cook, *Class. Rev.*, XXI, 133; Hommel, *Berl. Phil. Woch.*, XLVIII, 1127 f.

[3] Demos. lvii. 34.

[4] Lysias xxv. 3.

[5] Isoc. xv. 24; cf. xxi. 5: *οἶμαι δὴ πάντας εἰδέναι ὅτι μάλιστα συκοφαντεῖν ἐπιχειροῦσιν οἱ λέγειν μὲν δεινοί, ἔχοντες δὲ μηδέν, τοὺς ἀδυνάτους μὲν εἰπεῖν, ἱκανοὺς δὲ χρήματα τελεῖν.*

[6] xii. 5.

[7] In Smith, *Dictionary of Greek and Roman Antiquities*, *s.v.* "Sycophantes."

generally, all abuse of legal process for mischievous or fraudulent purposes."[1] If to this all-embracing definition we add any kind of scoundrel (πονηρός) on the authority of Aeschines,[2] we have a wider definition than any Greek writer or scholiast or lexicographer has recorded; but it would afford the drawer of an indictment little assistance. The meaning which συκοφάντης has in a particular passage depends much upon the circumstances. But it is at best an ugly word and the litigant who applied it to his opponent wished to get the full benefit of all its implications.

Litigation was the handmaiden of politics in Athens.[3] Young men with political ambitions sought to advance their fortunes by prosecuting officials at their audits, and politicians for bribery, corruption, misappropriation of public funds, illegal legislation, and other high crimes and misdemeanors. Pericles, for example, first came into public notice by his prosecution of Cimon for accepting bribes during his military command: πρὸς τὸ δημαγωγεῖν ἐλθόντος Περικλέους, καὶ πρῶτον εὐδοκιμήσαντος ὅτε κατηγόρησε τὰς εὐθύνας Κίμωνος στρατηγοῦντος νέος ὤν.[4] Aristophanes tells us Hyperbolus the demagogue acquired a legal education before he entered politics:

> How can *he* learn evasion of a suit,
> Timely citation, damaging replies?
> Hyperbolus, though, learnt them for a talent.[5]

Naturally there was no objection to the prosecution of dishonest officials and public men. Indeed, the administration of justice would have broken down if competent men had refused to participate, even if they expected to profit politi-

[1] *Orations of Demos.* (trans.), III, 345; cf. also Navarre's definition in Darem.-Saglio, *s.v.* "Sycophanta": "Délation, escroquerie et chantage, ces trois termes résument assez exactement, comme on le voit, l'industrie complexe du sycophante."

[2] ii. 99.

[3] Cf. Thuc. viii. 54. 4: τάς τε ξυνωμοσίας, αἵπερ ἐτύγχανον πρότερον ἐν τῇ πόλει οὖσαι ἐπὶ δίκαις καὶ ἀρχαῖς.

[4] Arist. *Ath. Pol.* xxvii; cf. *supra*, pp. 26 f., 33, n. 4.

[5] *Clouds* 874–76: πῶς ἂν μάθοι ποθ' οὗτος ἀπόφυξιν δίκης
ἢ κλῆσιν ἢ χαύνωσιν ἀναπειστηρίαν;
καίτοι ταλάντου τοῦτ' ἔμαθεν Ὑπέρβολος.

cally from their activities. But abuses appeared. In the *Knights* of Aristophanes,[1] Cleon is accused of squeezing men subject to audit (*πιέζων τοὺς ὑπευθύνους*) and of prosecuting inoffensive citizens, men of means who shrink from litigation (*πλούσιος καὶ μὴ πονηρὸς καὶ τρέμων τὰ πράγματα*). The choregus in Antiphon says that his accuser Philocrates made a practice of accusing *ὑπεύθυνοι* and playing the sycophant: *Φιλοκράτης γὰρ οὑτοσὶ ἑτέρους τῶν ὑπευθύνων ἔσειε καὶ ἐσυκοφάντει.*[2]

It must at all times have been a difficult matter to distinguish between a public-spirited prosecutor and an unscrupulous sycophant who posed as a public benefactor.[3] In the *Plutus*, Aristophanes pictures a sycophant, who had been deprived of his livelihood by the reforms instituted by Plutus, as claiming to be an indispensable public benefactor:

SYCOPHANT: Alas! What a shame that I, good and patriotic citizen that I am, should be so abused.

NEIGHBOR: You a good and patriotic citizen?

SYCOPHANT: As never man was.

NEIGHBOR: How do you make a living?

SYCOPHANT: I superintend all public and private affairs.

NEIGHBOR: You do? Why?

SYCOPHANT: I want to. Is it not my duty to help the city to enforce the laws and hinder men from doing wrong?

NEIGHBOR: But does not the state appoint judges for just that purpose?

SYCOPHANT: But who accuses?

"Anyone who wants to" (*ὁ βουλόμενος*), replies the neighbor in the language of Solon's law which permitted anyone who pleased (*ὁ βουλόμενος*) to prosecute. "Well, I am the one who wants to," responds the sycophant.[4]

There is plenty of evidence that sycophancy at its worst was quite prevalent in Athens in the late fifth century. Aristophanes in the *Acharnians*,[5] presented in 425 B.C., rep-

[1] 259 ff.; cf. 824–25.

[2] Antiph. vi. 43. The word *σείω* is used generally of legal processes or threats to secure money; cf. Aristoph. *Knights* 840; *Peace* 639.

[3] Cf. "the watchdog of the people" (*κύων τοῦ δήμου*), Demos. xxv. 40.

[4] *Plutus* 899–918; cf. Lofberg's translation of the passage, *op. cit.*, pp. 2 f.

[5] 902 ff.

resents Dicaeopolis as making a deal with the Boeotian for some of his wares. "What price do you ask?" says Dicaeopolis. "Or will you take some goods from here in exchange?" "Indeed I will, something that Athens has but we have not," replies the Boeotian. After suggesting sardines or crockery of which the Boeotian will have none, Dicaeopolis exclaims, "I have it. Take a sycophant."[1] When Dicaeopolis sets up his market-place under the separate peace he had made with the Lacedaemonians, he proclaimed, "Let no sycophant come within these bounds."[2] Rogers quite properly renders *συκοφάντης* by "informer," for it is in the capacity of informers that sycophants appear in the play. As Dicaeopolis concludes his bargain with the Megarian for the sale of his daughters disguised as pigs, a sycophant appears to denounce them as contraband of war subject to seizure and immediate sale. "Ah, here it is again, the source of all our woes," exclaims the Megarian.[3] The reference is to the activities of Athenian sycophants in enforcing the customs laws against the Megarians some time before the passage of the final law excluding the Megarians from the harbors of the empire and the market of Attica.[4] These officious and troublesome informers are guilty of no wrongdoing; they are *πολυπράγμονες*, as the search of the clothing of Megarians for contraband articles shows.[5] Public opinion was the sole check upon this activity of sycophants.

Aristophanes is said to have won distinction by attacking the sycophants: *φασὶ δὲ αὐτὸν εὐδοκιμῆσαι συκοφάντας καταλύσαντα· οὓς ὠνόμασεν ἠπιάλους ἐν Σφηξίν, ἐν οἷς φησιν Οἳ τοὺς πατέρας (αὐτῶν) ἦγχον νύκτωρ, καὶ τοὺς πάππους ἀπέπνιγον.*[6]

[1] Aristophanes is quick to pun on words that suggest in sense or sound either of the parts of *συκο-φάντης*. Puns on *φάσις*, a process much favored by sycophants, and the river *Φᾶσις* are obvious and apt (*Acharnians* 725–26, 908; *Birds* 68; *Knights* 1256). More common are references, some quite far-fetched, to *σύκα* (*Wasps* 145, 897; *Knights* 529; *Plutus* 946).

[2] *Acharnians* 725. [3] *Ibid.* 820–21.

[4] Bonner, "The Megarian Degrees," *CP*, XVI, 238 ff.

[5] For the correct interpretation of *ἐσυκοφάντει Μεγαρέων τὰ χλανίσκια* cf. Van Leeuwen, note on *Acharnians* 519.

[6] *Vita Aristoph.* xii. 7 (Bergk).

One would like to believe that the reference is to a comedy against sycophants, perhaps the Γεωργοί as Zielinski suggests,[1] rather than to his various strictures on them in his different plays.[2] For the sum total of these passages could hardly have produced a κατάλυσις συκοφαντῶν.

Isocrates' choice of the sycophant motif in the *Antidosis* is significant. His *apologia pro vita sua* in imitation of Plato's *Apology of Socrates* takes the form of a forensic speech. He imagines his prosecutor to be a sycophant who brought an indictment against him and made use of some of the slanderous or unfavorable statements about his teaching that were made in the real *antidosis*.[3] There was a twofold advantage in this device. The public was accustomed to hearing and reading orations, and would be inclined to read a disquisition in the form of a forensic speech. Furthermore, the case against Isocrates is at once discredited by the fact that the prosecutor as a sycophant belonged to a well-known and highly obnoxious class of citizens.

In the orators litigants bandy back and forth charges of sycophancy in the hope of embarrassing their opponents. This practice shows that the speech-writers, who doubtless knew the temper of the courts, believed these charges would help their clients.[4] In anticipation of such charges litigants assure the dicasts that, like Trygaeus in the *Peace*, they are not sycophants or lovers of lawsuits.[5]

Sycophancy could not have flourished before the establishment of the heliastic courts under Cleisthenes[6] even though the freedom of prosecution was granted by Solon. The early success of the sycophants was due mainly to their skill in the new rhetoric which was introduced about the middle of the fifth century. It gave them a distinct advantage over their

[1] *Die Gliederung der altattischen Komoedie*, pp. 42, 106.

[2] *Wasps* 1037; *Ecclesiazusae* 562–63; cf. the notes of Starkie and Rogers.

[3] Jebb (*Attic Orators*, II, 131–32) has not put the case clearly; cf. Bonner, "The Legal Setting of Isocrates' *Antidosis*," *CP*, XV, 193 ff.; Norlin, *Isocrates*, II, 181–82.

[4] Lysias vii. 1; Aeschin. i. 1; cf. Antiph. v. 59, 79; Demos. xxii. 4; xl. 32.

[5] Aristoph. *Peace* 191; cf. Lysias xxxii. 1–2; Aeschin. i. 1; Demos. xxxix. 1; liii. 1.

[6] Cf. *supra*, I, 196.

older opponents.[1] A passage in the *Wasps*[2] refers to sycophants as an ancient evil, describing them as "chills" and "fevers" which plagued "your fathers and grandfathers." Allowing for the comic exaggeration in the matter of time, this passage indicates that sycophants were regarded as a serious menace to the proper administration of criminal justice as early as the middle of the fifth century. In the last years of the century it is clear that sycophancy had become a pernicious profession. The revolution of 411 B.C. aroused the democrats to take stern, not to say harsh, measures against all those who were in any way identified with the oligarchic revolution. One instance was the law depriving the soldiers who had remained in Athens during the rule of the Four Hundred of the right to sit in the assembly or to be members of the council.[3] There was also the decree of Demophantus.[4] This was not an ordinary decree but the adopted report of a legislative commissioner, as the words *τάδε Δημόφαντος συνέγραψεν* indicate.[5] Anyone who in the future should participate in any way in the overthrow of the democratic constitution was declared a public enemy whom each and every citizen bound himself by oath to slay: *καὶ λόγῳ καὶ ἔργῳ καὶ ψήφῳ καὶ τῇ ἐμαυτοῦ χειρί.*[6]

In such an atmosphere sycophancy flourished. A regular reign of terror resulted, as the following quotation from a speech of Lysias shows, even when one has made due allowance for forensic exaggeration:

> You know that Epigenes, Demophanes and Cleisthenes, while reaping their personal gains from the city's misfortunes, have inflicted the heaviest losses on the public weal. For they prevailed on you to condemn several men to death without a trial, to confiscate unjustly the property of many more, and to banish and disfranchise other citizens; since they were capable of taking money for the release of offenders, and of appearing before you to effect the ruin of the innocent. They did not stop until they had involved

[1] Cf. Aristoph. *Acharnians* 676 ff., and *supra*, p. 29.

[2] 1037–42. [3] Andoc. i. 75. [4] *Ibid.* 96 ff.

[5] Cf. F. D. Smith, *Athenian Political Commissions*, pp. 71 ff.

[6] Andoc. i. 97.

the city in seditions and the gravest disasters, while raising themselves from poverty to wealth.[1]

In the *Frogs*,[2] Aristophanes urged the citizens "to end the reign of terror" (*κἀφελεῖν τὰ δείματα*). Within a few months the unexpected disaster at Aegospotami left no option in the matter and a general amnesty was declared by the decree of Patroclides.[3] When, after the surrender of Athens, the Thirty were installed, their first measure was against the sycophants. Nothing so well shows the general detestation in which sycophants were held as the popular approval of this measure with regard to *τοὺς ὁμολογουμένους συκοφάντας*. They were brought to trial before the boulé and condemned to death:

ἔπειτα πρῶτον μὲν οὓς πάντες ᾔδεσαν ἐν τῇ δημοκρατίᾳ ἀπὸ συκοφαντίας ζῶντας καὶ τοῖς καλοῖς κἀγαθοῖς βαρεῖς ὄντας, συλλαμβάνοντες ὑπῆγον θανάτου· καὶ ἥ τε βουλὴ ἡδέως αὐτῶν κατεψηφίζετο οἵ τε ἄλλοι ὅσοι συνῄδεσαν ἑαυτοῖς μὴ ὄντες τοιοῦτοι οὐδὲν ἤχθοντο.[4]

Another measure of the Thirty was aimed indirectly at sycophants. They removed some of the obscurities and restrictions in the laws, *ὅπως μὴ ᾖ τοῖς συκοφάνταις ἔφοδος*.[5]

The best examples of the activities of the kind of sycophant "who brings all sorts of charges but proves none"[6] are afforded by Demosthenes' own experience as related in *De corona:*

Afterwards when those who were bent on doing me mischief conspired and brought indictments, audits, impeachments, and the rest of it against me, not at first in their own persons, but in such names as they imagined would most effectually screen themselves (for you surely know and re-

[1] Lysias xxv. 25–26 (trans. Lamb). Thalheim, in his edition, dates the speech *ca.* 400 B.C.

[2] 688. The play was produced in 405 B.C.

[3] Andoc. i. 77 ff.

[4] Xen. *Hell.* ii. 3. 12; cf. Arist. *Ath. Pol.* xxxv. 3, who says with regard to these executions: *ἐφ' οἷς ἔχαιρεν ἡ πόλις γιγνομένοις, ἡγούμενοι τοῦ βελτίστου χάριν ποιεῖν αὐτούς.* Cf. Diod. Sic. xiv. 4; Lysias xxv. 27; *supra*, I, 332.

[5] Arist. *Ath. Pol.* xxxv. 2; for the law forbidding the teaching of rhetoric cf. *supra*, I, 328; Xen. *Mem.* i. 2. 31; Grote, *History of Greece*, VIII, 47 ff. If enforced for any length of time the law would have materially reduced the activities of sycophants.

[6] Demos. lvii. 34.

member that every day of that first period I was arraigned, and that neither the desperation of Sosicles, nor the malignity of Philocrates, nor the madness of Diondas and Melantes, nor anything else was left untried by them against me), on all those occasions chiefly through the gods, secondly through you I was preserved. . . . . On the impeachments when you acquitted me and did not give the prosecutors a fifth part of the votes you pronounced that my policy was best; by my acquittal on the indictments my motions and counsels were shown to be legal, by your passage of my accounts you acknowledged my whole conduct to have been honest and incorruptible.[1]

It is altogether likely that Sosicles, Diondas, and Melantes were, like Philocrates, sycophants acting as agents for others (*συστάντων οἷς ἦν ἐπιμελὲς κακῶς ἐμὲ ποιεῖν*).[2] Aristogiton, who was at least once convicted of sycophancy, brought seven indictments against Demosthenes.[3] The suits are called simply *γραφαί*, without qualification, but they undoubtedly mean prosecutions for illegal legislation, just as in the passage quoted from *De corona*. The words *ἐν οἷς δὲ τὰς γραφὰς ἀπέφευγον, ἔννομα καὶ γράφειν καὶ λέγειν ἀπεδεικνύμην*[4] leave us in no doubt. Aristogiton prosecuted Demosthenes twice on his audit. Like Sosicles and the others, Aristogiton failed to win any of these cases. Aristophon, a politician of the early fourth century, was acquitted seventy-five times on indictments for illegal legislation.[5] These prosecutions were more largely political in the age of Demosthenes, as compared with the earlier period of the history of the *γραφὴ παρανόμων*. Verdicts were determined to a considerable extent by the political views of the dicasts, but the fact remains that a very considerable number of these prosecutions were based upon inadequate grounds, as is shown by the verdicts of acquittal. It is also true that many of them were instituted by sycophants.

Hyperides cites a number of cases of a different class where sycophants failed to obtain a verdict:

You, Polyeuctus, and those who are of your opinion seem to me to fail entirely to recognize the fact that no democracy in the world, no monarch,

[1] *Ibid.* xviii. 249–50.

[2] Cf. *infra*, pp. 55 f.

[3] Demos. xxv. 19: *τί γὰρ ἂν γένοιτο συκοφαντίας καὶ παρανομίας δεινότερον, ἐφ' οἷς ἀμφοτέροις οὗτος ὤφληκεν.* Cf. *ibid.* 37.

[4] *Ibid.* xviii. 250.

[5] Aeschin. iii. 194.

no nation is more magnanimous than the people of Athens; they allow no individual citizen or group of citizens to be persecuted in the courts but afford them protection. Teisis of Agraulae first listed as public property the estate of Euthycrates which amounted to more than sixty talents. Next he promised that he would enter suit to sequester the property of Philip and Nausicles, alleging that their wealth came from unpaid mining royalties. But the dicasts were so far from heeding any such language or coveting the property of others that the man who attempted to play the sycophant failed to receive a fifth part of the votes and was in consequence fined and disfranchised. And is not this action of a jury only last month deserving of great praise, may I ask? Lysander charged Epicrates of Pallene, who had worked a mine for three years, with encroaching on public property. With him were associated about the wealthiest men in the city. Lysander promised to recover for the state three hundred talents which he claimed these men had realized by their operations. Nevertheless the jury, having regard not for the promises of the prosecutor but for justice, decided that there was no encroachment.[1]

Here we have two types of cases favored by sycophants because they involved a substantial financial reward for the successful prosecutor. Teisis filed an ἀπογραφή claiming that the estate of Euthycrates was liable to confiscation. His share would have amounted to forty talents. He lost the case and being disfranchised was unable to prosecute similar cases against two other citizens as he had promised. The other type of case is φάσις, used in mining cases where the defendant is charged with encroaching on state property. In this case a number of men were in the deal, and it was claimed that the sum involved was three hundred talents, of which the prosecutor would have received one-half. The effect of the verdict in this one case restored confidence in the mining industry to the profit of the state in increased royalties.[2] Here again the charges were ill-founded, but the stakes were large. If the sycophant could bribe the dicasts with the prospect of rich confiscations and fines he might win his case.

The words of Hyperides deserve credence. They were uttered before men who had every opportunity to know whether they were true or false. The last case was less than two months old.

Probably the most dangerous type of sycophant was the

[1] iv. 33–36. [2] Hyper. iv. 36.

blackmailer, who threatened or started criminal proceedings against a citizen of means and then proposed to drop them for a consideration. Isocrates has left a brief description of the *modus operandi* of the blackmailing sycophant.[1] A certain Callimachus had entered suit for damages and took care to let it be known in the lounging places of the town that he had been badly treated by the defendant. In due time some of the intimates of Callimachus approached the defendant and pointed out the unpleasantness and risks of litigation involving a huge sum of money. In litigation, they said, many things turn out contrary to expectation, and chance rather than justice determines the verdicts. And so it was to the advantage of the defendant to be free from such weighty charges by the expenditure of a small sum of money. The speaker makes it clear that the suggestions of the intimates of Callimachus were the usual method of handling these things (*τῶν εἰθισμένων περὶ τῶν τοιούτων λέγεσθαι*). The upshot was that the speaker gave Callimachus the comparatively small sum of money, two hundred drachmas, 2 per cent of the amount claimed. As this was a civil case, the "holdup" took the form of a settlement by way of an agreed arbitration (*δίαιταν ἐπὶ ῥητοῖς*). The decision of the arbitrator made the agreement a binding transaction reduced to a form which could be pleaded in bar of any action at law involving the same matter.

It is quite apparent that the mere threat of prosecution was sufficient to frighten a peaceable man who had the means to pay the small sum required to free him from the annoyance and danger of litigation even if he had a higher opinion of Athenian justice than the intimates of Callimachus had.[2]

Undoubtedly litigation was feared. Antiphon in the first Tetralogy puts forward the fear of prosecution as a motive for murder. This was a mere rhetorical exercise, but it is significant that it was a *topos* in the schools. One meets it in actual litigation. A client of Lysias, who was charged with the murder of his wife's paramour caught *in flagrante delicto*, relied in his defense on the Athenian law which permitted the

[1] xviii. 9–10. [2] Cf. Demos. lviii. 34.

outraged husband to punish the wrongdoer even with death if he wished. The relatives of Eratosthenes, the alleged adulterer, argued that he was guiltless of adultery but was caught and slain by means of a plot. In answer the speaker denies that there was any hostility on his part toward Eratosthenes and lists the likely reasons for so deadly an enmity:

> For he had neither subjected me to slanderous impeachment, nor attempted to expel me from the city, nor brought any private suit against me, nor was he privy to any wrongdoing which I was so afraid of being divulged that I was intent on his destruction.[1]

In the definitions of sycophancy given by the orators blackmail is mentioned more than once.[2] Specific examples are not wanting. Reference has been made to the cases of Epigenes, Demophanes, and Cleisthenes.[3] Other blackmailers are freely mentioned, such as Theocrines,[4] Aristogiton,[5] Timarchus,[6] and Ariston. The defendant in *Ariston* v. *Lycophron* has this to say of Ariston's activities as sycophant-blackmailer: "He goes around, summoning all men to court and whoever of them refuses to pay money to him he brings into court and prosecutes, but he takes no proceedings against those who are willing to pay."[7]

The extreme triviality of the charges made by sycophants is well illustrated by this fragment of Teleclides. Speaking of a sycophant, he says:

> Charicles gave the man a pound the matter not to name,
> That from inside a money bag into the world he came;
> And Nicias, also, paid him four; I know the reason well,
> But Nicias is a worthy man and so I will not tell.[8]

But here and there in the literature of the period we get stories which show how dangerous sycophants were. For ex-

[1] Lysias i. 44 (trans. Lamb).

[2] Isoc. xv. 24–25; Lysias xxv. 3.

[3] Lysias xxv. 25–26; cf. *supra*, pp. 47 f.

[4] Demos. lviii. 43; cf. Lofberg, *op. cit.*, pp. 83 ff.

[5] Demos. xxv. 47; cf. Lofberg, *op. cit.*, pp. 78–83.

[6] Aeschin. i. 107.

[7] Hyper. i. 2.

[8] Plut. *Nicias* iv. 4 (trans. Clough).

ample, Diognetus, a brother of Nicias, was so hounded by the sycophants that he went into voluntary exile.[1] Charmides in the *Symposium* of Xenophon[2] says that freedom from sycophants is one of the things that reconcile him to his poverty. When he was rich he had to pay court to them. Undoubtedly he was speaking of blackmail, as the words *τοὺς συκοφάντας ἐθεράπευον* clearly indicate. Another man who suffered much from the exactions of sycophants was Nicias. Plutarch tells us that "he gave to those who could work him harm no less than to those who deserved his favors."[3] So terrified was he of sycophants and blackmailers that he avoided all public appearances and social engagements as far as possible. "Since he was disposed to be thus cautious of public informers, he would neither dine with a fellow-citizen, nor indulge in general interchange of views or familiar social intercourse."[4] Crito, the friend of Socrates, was also much annoyed by sycophants, as we learn from the *Memorabilia* of Xenophon:

> I remember that Socrates once heard Crito say that life in Athens was difficult for a man who wanted to mind his own business. "At this moment," added Crito, "actions are pending against me, not because I have done the plaintiffs any wrong but because they think I would sooner pay than have trouble."[5]

When Crito proposed to smuggle Socrates out of prison he anticipated trouble from the sycophants who might seek to prosecute or blackmail the friends of Socrates but reassured Socrates that they were easily bought (*εὐτελεῖς*). Crito also expressed concern lest the friends of Socrates might be criticized for allowing the case to come to trial at all when it could have been prevented (*καὶ ἡ εἴσοδος τῆς δίκης εἰς τὸ δικαστήριον ὡς εἰσῆλθεν ἐξὸν μὴ εἰσελθεῖν*).[6] It has been reasonably suggested that Crito may have had in mind a settlement with the accusers of Socrates.[7] It need hardly be said that, just as Socrates rejected the idea of jail delivery, so he would not have agreed to any such financial settlement. It may be objected that Meletus, who laid the charge, was some-

[1] Lysias xviii. 9.
[2] iv. 29 ff.
[3] *Nicias* iv. 3.
[4] *Ibid.* v. 1.
[5] ii. 9. 1.
[6] Plato *Crito* 45A–E.
[7] Lofberg, *op. cit.*, p. 40.

thing of a fanatic and not the sort of person to be bought off. This is doubtless true, but the concern of Crito regarding public opinion in the matter indicates a pretty general idea that most prosecutors could be bought off.

Neither Lofberg nor anyone else has, it would seem, discussed the question of the victim's security after he had paid blackmail. Perhaps he had no assurance that threats would not be renewed by the same or other sycophants and more money demanded. In the only case where we know the details of a "settlement" out of court in a civil suit, viz., by an arbitration (ἐπὶ ῥητοῖς), Callimachus revived the suit. The result is not known. In the cases of Patrocles and Lysimachus, who paid him altogether twelve minas in the same matter, Callimachus remained satisfied.[1]

There are indications that sycophants with common interests tended to form associations. On two occasions[2] we hear of ἐργαστήρια συκοφαντῶν. Whether these were real clubs of sycophants or mere temporary organizations of rascals for a specific case is quite immaterial. It does seem possible that in these groups there might have been some understanding that when one sycophant made a satisfactory settlement with a victim the others would leave him alone. Only in some such fashion as this could a victim be assured of immunity when he had once paid.[3]

As it was a punishable offense to drop a prosecution once it was started, a settlement out of court by means of an arbitration (ἐπὶ ῥητοῖς) could not be used. But one suspects that formal reconciliations between forensic enemies which are so common in the orators may sometimes have been occasioned by the payment of money. But this is a mere suspicion without foundation in the sources.

[1] Isoc. xviii. 6–7; cf. *supra*, p. 51.

[2] Demos. xxxix. 2; xl. 9.

[3] For clubs of sycophants see De Vos, *De sycophantis*, pp. 40–45; Leisi, *Der Zeuge im Attischen Recht*, p. 119; Calhoun, *Athenian Clubs*, pp. 79–81, 95–96; Lofberg, *op. cit.*, p. 60; Lipsius (*op. cit.*, p. 909, n. 33) roundly rejects the view that there were clubs of sycophants, but Hommel (*op. cit.*, p. 1131) agrees with Calhoun and Lofberg as against Lipsius.

The sycophant was always ready to put his services at the disposal of others for hire. As an agent, his knowledge of law and rhetoric could be put to various uses. He might act as an advocate on occasion, if we are to class as sycophants those who took money for their services as pleaders in court contrary to law.[1] Perhaps the most useful service a sycophant-agent could perform was to bring countersuits against an accuser of his client. A good illustration is the suit brought against the choregus in Antiphon[2] by Philocrates, a professional sycophant. The purpose of the charge of homicide was to disqualify the choregus for prosecuting a group of officials for misappropriation of public funds.[3] Midias[4] attempted by a similar maneuver to discredit Demosthenes. He hired a sycophant, Euctemon, to charge Demosthenes with a military offense. It made no difference that the case never came to trial; it was enough that all men should see a notice to the following effect: *Εὐκτήμων Λουσιεὺς ἐγράψατο Δημοσθένην Παιανιέα λιποταξίου.* Aristogiton, another notorious sycophant, was the paid agent of the pro-Macedonian party and prosecuted Demosthenes seven times.[5]

There is no indication of the amounts paid to the sycophant-agent. In desperate cases where he risked a fine of one thousand drachmas and the loss of the right to bring a similar prosecution in the future the compensation must have been considerable. The one thousand drachmas given by Callias to Cephisius to indict Andocides for impiety may very well have been intended to cover a possible fine. If he escaped the fine, he had his fee. Such an arrangement would put the sycophant on his mettle. It was a great convenience for politicians, particularly during the struggle with Macedonia, to attack their opponents through the medium of an agent who could be disavowed if need be. The disadvantage lay in the

[1] Cf. Demos. xxi. 113; xlvi. 26; Lycurg. i. 138; *supra*, pp. 10 ff.

[2] vi. 21.

[3] For a full account of the case see Calhoun, *op. cit.*, pp. 49–51; cf. Lofberg, *op. cit.*, pp. 49 ff.

[4] Demos. xxi. 103.

[5] *Ibid.* xxv. 37; for other attacks on Demosthenes cf. *supra*, pp. 48 f.

fact that an agent must sometimes be protected and defended in court. Agents could also be intrusted with proposing and carrying decrees and laws which benefited their employers.[1]

If one accepts the statement of Aeschines that any rogue might be called a sycophant, those who were professional witnesses, such as Polyeuctus, Timocrates, and Euctemon, may be included among the sycophants,[2] as well as the bribers of dicasts, ecclesiasts, and officials.[3] Perhaps the best example of the rascal-sycophant-agent is Pythodorus, the expert forger of seals and documents.[4] But in estimating the effect of sycophancy on the administration of justice in Athens it would be better to take no account of these lesser breeds of so-called sycophants.

In modern systems, though there are no counterparts of the Athenian sycophant, there is nevertheless the possibility of much unnecessary and unjustifiable litigation. Certain checks are provided. In civil cases the prospect of paying the entire cost of the litigation acts as a strong deterrent upon a prospective plaintiff. In criminal cases, while the decision as to whether the evidence available is sufficient to warrant a trial lies with the official prosecutor, he must first present enough evidence to the grand jury to obtain a true bill against the accused. Sufficient evidence must be offered at the hearing to establish a prima facie case.

In Athens, however, the costs of litigation were comparatively slight. The payment of them would not have frightened anyone who was anxious to proceed with a doubtful case. So a different kind of deterrent was devised. Any prosecutor in practically all public suits[5] who failed to obtain one-fifth of the votes was liable to pay a fine of one thousand drachmas.[6] Neither the law as cited by Demosthenes among the documents in the Midias case nor the part quoted in

[1] *Ibid.* xxiv. 3, 66, 203.

[2] *Ibid.* xix. 216; xxi. 139; xxix. 28.

[3] Lofberg, *op. cit.*, pp. 54 ff.

[4] Isoc. xvii. 33–34.

[5] For exceptions see Lofberg, *op. cit.*, p. 88.

[6] For the law see Demos. xxi. 47; cf. lviii. 6; Plato *Apol.* 36A–B; Andoc. iv. 18.

Epichares v. *Theocrines* (*ὥσπερ ἠκούσατ' ἐξ αὐτοῦ τοῦ νόμου, ἐὰν ἐπεξιών τις μὴ μεταλάβῃ τὸ πέμπτον μέρος τῶν ψήφων, χιλίας ἀποτίνειν*)[1] makes any reference to any other punishment beyond the fine. The same is true of the many casual references to the *πέμπτον μέρος* in the orators. But in other sources it is very definitely said that there was an additional penalty of partial *ἀτιμία*: *Ἀθήνησιν οὖν ἐν τοῖς δημοσίοις ἀγῶσιν ἐὰν μὴ μεταλάβῃ τις τὸ πέμπτον μέρος, χιλίας ἀποτίνει καὶ ἔτι πρόσεστί τις ἀτιμία οἷον (μὴ) ἐξεῖναι μήτε γράψασθαι παρανόμων μήτε φαίνειν μήτε ἐφηγεῖσθαι.*[2] It is also implied very definitely in others: *ἐὰν γὰρ μὴ μεταλάβῃ τὸ πέμπτον μέρος τῶν ψήφων καὶ ἀτιμωθῇ ὁ ἐνδείξας ἐμὲ Κηφίσιος οὐτοσί, οὐκ ἔξεστιν αὐτῷ εἰς τὸ ἱερὸν τοῖν θεοῖν εἰσιέναι, ἢ ἀποθανεῖται.*[3] The nature of the *ἀτιμία* is not set forth clearly in the sources. A passage in Andocides (*ἑτέροις οὐκ ἦν γράψασθαι, τοῖς δὲ ἐνδεῖξαι*)[4] shows that the penalty concerned only the particular kind of process that was employed in the case in question. For example, one might be prevented from using any kind of *γραφή* and still could use *φάσις*, *ἀπογραφή*, or *ἔνδειξις*. If one failed to pay the fine, in process of time he automatically became a state debtor and as such was *ἄτιμος*.

In theory perhaps the magistrate who accepted a criminal case and conducted the *anakrisis* might refuse to bring it up for trial if he deemed the evidence of wrongdoing unsatisfactory; but such a rejection might very well have had unpleasant consequences for the magistrate at his audit. Moreover, he had little or no evidence before him at the *anakrisis*.[5] There was apparently an exception in the case of the *euthynoi* who received complaints against a retiring magistrate. They had the right to reject a case on their own authority:

ὁ δὲ λαβὼν τοῦτο (τὸ ἀδίκημα) καὶ ἀνακρίνας, ἐὰν μὲν καταγνῷ, παραδίδωσιν τὰ μὲν ἴδια τοῖς δικασταῖς τοῖς κατὰ δήμους, τοῖς τὴν φυλὴν ταύτην

[1] Demos. lviii. 6.

[2] Theophrastus in Schol. Demos. xxii, cited by Lipsius, *op. cit.*, p. 449, n. 110. Cf. Pollux viii. 53.

[3] Andoc. i. 33; cf. Demos. xxvi. 9.

[4] i. 76.

[5] Cf. *supra*, I, 289 ff.; Calhoun, *CP*, XIV, 338 ff.

εἰσάγουσιν, τὰ δὲ δημόσια τοῖς θεσμοθέταις ἐπιγράφει. οἱ δὲ θεσμοθέται, ἐὰν παραλάβωσιν, πάλιν εἰσάγουσιν ταύτην τὴν εὔθυναν εἰς τὸ δικαστήριον.[1]

This specific statement regarding the *euthynoi* would seem to indicate that other officials were not expected at the *anakrisis* to accept or reject the case on its merits.

In the cases that came before the Forty (the bulk of the δίκαι) the arbitrators sifted the evidence and exhibited any weakness in it. They could not, however, prevent the suitor who lost in their court from appealing. There was a further check on unwarranted private suits. If the plaintiff failed to secure at least one-fifth of the votes, he was obliged to pay the defendant an obol for every drachma of his claim. This was the ἐπωβελία. It was not applied to all δίκαι.[2] It may be assumed that the fine was imposed automatically by the verdict of more than four-fifths of the jury and was collected in the usual way.

As long as the sycophant confined himself to mere threats of prosecution there was little or nothing to be done about it. But if the suit was once filed and proceedings begun, the prosecutor who dropped it was liable to a fine of one thousand drachmas and the loss of the right to bring similar suits in the future. He was in the same case as if he had carried the suit to trial and got less than one-fifth of the votes. In fact, the two matters are dealt with in the same law, as cited in Demosthenes: ἐάν τις μὴ ἐπεξέλθῃ ἢ ἐπεξιὼν μὴ μεταλάβῃ τὸ πέμπτον μέρος τῶν ψήφων, ἀποτισάτω χιλίας δραχμὰς τῷ δημοσίῳ.[3] If Lipsius is correct in assuming this law to be genuine, it means that in a general criminal statute there was always this provision, just as there was the provision that ὁ βουλόμενος might prosecute.[4] According to law, legal proceedings were started when the case was posted on the public notice board.

[1] Arist. *Ath. Pol.* xlviii. 5; cf. *infra*, p. 259, n. 2, for discussion of ἀνακρίνας reading.

[2] Cf. Lipsius, *op. cit.*, pp. 937 ff.

[3] xxi. 47.

[4] Cf. *supra*, I, 166 ff. It need scarcely be remarked that the rule did not apply to civil suits; cf. Demos. lviii. 20: ἀλλὰ προσήκει τοὺς ἀντιδίκους ὑπὲρ μὲν τῶν ἰδίων, ὅπως ἂν αὐτοὺς πείθωσι, διοικεῖσθαι πρὸς ἀλλήλους, ὑπὲρ δὲ τῶν πρὸς τὸ δημόσιον, ὅπως ἂν οἱ νόμοι κελεύωσιν.

If a prosecutor failed to proceed with the *anakrisis* he was liable to the fine.[1]

There are plenty of indications that this law intended to check the blackmailer-sycophant was not always enforced. It is known that for the purpose of encouraging prosecutors in certain types of suits no penalty was attached to failure to obtain at least one-fifth of the votes. Consequently, it is not unreasonable to assume that the same was true of the penalty for dropping these suits after they had been instituted.

Some evidence for this conclusion is available. The prosecutor of a guardian for *κάκωσις ὀρφάνου* was not liable to a fine if he failed to obtain one-fifth of the votes or even a single vote.[2] The reason for this is plain: orphans must be protected in their rights at all costs. Prosecutors must on no account be discouraged in their efforts to bring wicked guardians to justice. It is not surprising to find instances in which such cases were dropped before they came to trial. In *Epichares* v. *Theocrines* the defendant summoned Polyeuctus before the archon *λαβὼν δὲ τὰς τριακοσίας δραχμὰς παρὰ τοῦ Πολυεύκτου, καὶ τὰ δεινὰ ταῦτ' ἀποδόμενος μικροῦ λήμματος ἐφ' οἷς τῷ πατρὶ ἐτιμήσατο δέκα ταλάντων, ἀπηλλάγη καὶ τὴν γραφὴν ἀνείλετο προδοὺς τὸν ὀρφανόν.*[3] This is not a savory case, but it is clear that Epichares finds fault with the bribery rather than with the dropping of the case, which was doubtless permitted by law. One can well imagine that the threat from an honest prosecutor of legal proceedings, carried even to a summons, might frighten a guardian into doing justice to his ward. If this were true, it would be useless to proceed with the prosecution. Another example of exemption from penalties is a *γραφὴ ξενίας*. In the case against Neaera, Apollodorus proposed to drop the case against Neaera if he were convinced by conclusive evidence of the maternity of certain children whom he mentioned.[4] This offer would not have been made in open court if it would have rendered Apollodorus liable to a fine and partial disfranchisement.

[1] Demos. lviii. 10. [2] Isaeus iii. 46–47. [3] Demos. lviii. 32.

[4] *Ibid.* lix. 121; cf. *ibid.* 53, where Phrastor dropped a suit against Stephanus.

The exception in this case is easily understood, for the Athenians were very jealous of their citizenship, especially when it came to have a financial value in the way of indemnities and doles. There is no evidence that a failure to obtain at least one-fifth of the votes in a γραφὴ ξενίας carried no penalty, but it seems from this incident to be wholly unlikely that it did.

There was still another case which was ἀκίνδυνος. It was the indictment of one for injuring the sacred olive trees.[1] Here again it may plausibly be assumed in the absence of evidence that there was no penalty for dropping such a case.

It is evident that the motive which determined the dropping of a suit was of extreme importance. If the prosecutor accepted money he was, in modern terms, guilty of compounding a crime. But there were many good and sufficient reasons why an honest prosecutor might drop a case. The choregus in Antiphon[2] was forced to drop a prosecution of some officials when he was finally brought to trial for the death of a chorus boy in training under his charge. This is an extreme case. But others equally effective might be conceived, such as the serious illness of a prosecutor or the death of an indispensable witness. Many a modern prosecutor has been obliged to nolle prosequi a case because of the disappearance of witnesses.

Demosthenes himself dropped his suit against Midias, though in the published speech he reproaches Euctemon for dropping the suit started against himself. It is impossible to determine what, if any, difference there was between these two cases. Evidently exceptions were permitted and evasions tolerated. Calhoun[3] has pointed out that the law could be evaded with impunity. A case in point is mentioned in *Epichares* v. *Theocrines*[4] where the defendant is charged with having dropped a case against Demosthenes by the following device. When the case was called, an affidavit was produced that Demosthenes was ill and unable to attend. Though this was not true, the result was that the trial was postponed,

[1] Lysias vii. 37.

[2] vi. 38.

[3] *Op. cit.*, p. 58, n. 6.

[4] Demos. lviii. 43.

sine die as it turned out, for the plaintiff neither contested the affidavit nor resumed the case (*καὶ οὔτε τότε ἀνθυπωμόσατο οὔθ' ὕστερον ἐπήγγελκεν*). Epichares claimed that this was no new device but one frequently employed by men of the stamp of Theocrines.

In those instances in which prosecutions were dropped for good and sufficient reasons, one is compelled to inquire whether the prosecutor himself accepted the responsibility or whether he was officially authorized to drop the prosecution. Lipsius, influenced by the fact that where a prosecutor failed to obtain the requisite number of votes the fine was *ipso facto* registered against him as part of the verdict of the court, believed that the magistrate was empowered either to permit a case to be dropped if the reasons seemed adequate or to register the fine on his own authority.[1] A passage in Demosthenes[2] would seem at first sight to show that the penalty was automatic. After referring to a charge of *λιποταξίου* which Euctemon had been hired to bring against him, Demosthenes adds: *ἐφ' ᾗ γὰρ ἐκεῖνος ἠτίμωκεν αὐτὸν οὐκ ἐπεξελθών, οὐδεμιᾶς ἔγωγ' ἔτι προσδέομαι δίκης, ἀλλ' ἱκανὴν ἔχω.* The words may refer to Euctemon's failure to pay the one thousand drachmas assessed against him by the magistrate before whom the case was filed. Persistent failure to pay would incur *ἀτιμία*. But the words may equally well refer to the partial *ἀτιμία* incurred for dropping a prosecution. This penalty, however it was inflicted, could be enforced only by the watchful vigilance of volunteer prosecutors. Any person prosecuted by one who had been deprived of the right to file such an indictment could be confidently relied upon to see that the prosecutor desisted. To all intents and purposes it could be said of such a person *ἠτίμωκεν αὐτόν*. Furthermore,

[1] Meier-Schömann-Lipsius, *Der Attische Process*, pp. 912 ff.; Lipsius, *op. cit.*, pp. 448–50. Platner (*Process und Klagen*, I, 127), takes the contrary view, as do Calhoun (*op. cit.*, p. 58, n. 6) and Lofberg (*op. cit.*, pp. 86 ff.). Caillemer, in Darem.-Saglio, *s.v.* "Graphé", believes that the legitimacy of the reasons for which the case was dropped could not be determined by a magistrate. The Athenians were too jealous of magisterial authority to delegate to a magistrate the decision of matters which lay within the province of a court of law.

[2] xxi. 103.

the words *οὐδεμιᾶς ἔγωγ' ἔτι προσδέομαι δίκης, ἀλλ' ἱκανὴν ἔχω* seem to indicate that Demosthenes might have taken further action, viz., the collection of the fine by the appropriate legal action, such as that taken in *Epichares* v. *Theocrines*. The defendant Theocrines was prosecuted on at least four charges, one of which was that, having dropped a suit against one Micion, he was liable to a fine of one thousand drachmas. Now if it is true that when a prosecutor dropped a case the magistrate made a notation of the fine of one thousand drachmas and passed it on to the proper authorities for collection, it would seem that this notation would have been sufficient to establish the guilt of Theocrines. But Epichares says nothing of any such record. First he has Theocrines' denunciation (*φάσις*) of Micion read, next the evidence of witnesses who saw it exposed (*ἐκκειμένην*). Then he called the Overseers of the Port (*ἐπιμεληταὶ τοῦ ἐμπορίου*) and their secretary before whom the case came.[1] The purport of this testimony was "that Theocrines gave in a denunciation against the vessel of Micion and that the denunciation was exposed in public for a long time, and being called to the *anakrisis*, he did not attend or proceed with the case." It is obvious not only that there was no penalty registered but that nothing whatever had been done officially that could be accepted as evidence. It is equally obvious, moreover, that without the intervention of Epichares or another volunteer prosecutor Theocrines would never have been obliged to pay the fine. That the acceptance of a bribe to drop a case was the real offense may be suspected from the fact that Epichares alleges that Theocrines made a business of taking bribes under these circumstances, and proposed to call as witnesses the bribers or victims, among whom are Hyperides and Demosthenes.[2] The latter refused to testify[3] because, according to Epichares, he had settled his difference with Theocrines by inducing him to drop a *γραφὴ παρανόμων* by a safe device already discussed.[4] But this does not explain how Demos-

[1] Demos. lviii. 6–10, 26.

[2] *Ibid.* 34–35.

[3] *Ibid.* 42.

[4] Cf. *supra*, pp. 60 f.

thenes for political reasons and the sum of thirty minas dropped his case against Midias for assault and had the assurance to salvage what he could of the attack on Midias by publishing the speech he had prepared for the court.[1]

On the whole the law could not have been an effective check on sycophants. In one fashion or another it was possible to evade it. In the first place there were types of cases that were excepted from the provisions of the law in the public interest. Where there was collusion between the parties the case could be continued until it was officially forgotten. Lipsius[2] supposes that permission to withdraw a case could be secured. In this way he would explain the case of *Demosthenes* v. *Midias*. This view, however, is open to grave doubts.

Besides this indirect means of restraining and punishing sycophants there were legal processes that could be used against the sycophant directly. Isocrates mentions three:

> They applied to the sycophant more stringent laws than to other criminals; for, while they placed the trial of the greatest crimes in the hands of a single one of the courts, against the sycophants they instituted *γραφαί* before the thesmothetai, *εἰσαγγελίαι* before the senate, and *προβολαί* before the general assembly.[3]

There is no information regarding the form of the indictment. It is difficult to see how one could draft or prove a general charge of sycophancy such as is freely made by litigants against their opponents. Even Aeschines' definition is vague.[4] So far as is known, the only law under which a sycophant could be held liable was the ancient law cited by Demosthenes: *ἔστι δὲ δήπου νόμος ὑμῖν, ἐάν τις ὑποσχόμενός τι τὸν δῆμον ἢ βουλὴν ἢ δικαστήριον ἐξαπατήσῃ, τὰ ἔσχατα πάσχειν.*[5] The law was enforced by *εἰσαγγελία*,[6] and the death penalty could be inflicted.[7] The law resembles closely the curse pronounced by the herald at the opening of the ecclesia: *διόπερ καταρᾶται καθ' ἑκάστην ἐκκλησίαν ὁ κῆρυξ οὐκ εἴ τινες ἐξη-*

[1] Schaefer, *Demosthenes und seine Zeit*, II, 108–9.

[2] *Op. cit.*, p. 450, n. 113.

[3] xv. 314 (trans. Norlin).

[4] ii. 145.

[5] xx. 100.

[6] xlix. 67.

[7] xx. 135.

πατήθησαν, ἀλλ' εἴ τις ἐξαπατᾷ λέγων ἢ βουλὴν ἢ δῆμον ἢ τὴν ἡλιαίαν.[1] It will be noted that instead of λέγων in the curse the law has ὑποσχόμενος, which is not a very suitable word to apply to a prosecutor in court, although, as it happens, it is precisely the word used by Hyperides of sycophants.[2] But at the time of the drafting of the law the sycophant was not as yet a problem.[3]

There is an interesting record of proceedings taken against the men popularly regarded as responsible for the condemnation of the generals after the battle of Arginusae. The procedure began by a προβολή and the charge was τὸν δῆμον ἐξαπατῆσαι:

> And not long afterwards the Athenians repented, and they voted that complaints [προβολάς] be brought against any who had deceived the people, that they furnish bondsmen until such time as they should be brought to trial, and that Callixenus be included among them. Complaints were brought against four others also [προυβλήθησαν] and they were put into confinement by their bondsmen. But when there broke out afterwards a factional disturbance, in the course of which Cleophon was put to death, these men escaped, before being brought to trial; Callixenus indeed returned, at the time when the Piraeus party returned to the city, but he was hated by everybody and died of starvation.[4]

The exact steps in the process are not at all clear. Normally the *probolé* was brought by any citizen who wished to strengthen his case against a notorious wrongdoer. The known examples of *probolai* include charges of disturbing religious festivals, sycophancy, and deceiving the people by false promises.[5] These are all cases that would naturally arouse wide popular interest and concern. The vote of the assembly was a mere resolution without legal effect. The prosecutor was free to drop the matter or to indict the alleged

[1] xxiii. 97.

[2] iv. 35–36, quoted *supra*, pp. 49 f.

[3] Cf. *supra*, I, 208–9.

[4] Xen. *Hell.* i. 7. 35 (trans. Brownson). For another reference to the authorization of *probolai* by the ecclesia as a regular proceeding cf. Pollux viii. 46: προβολαὶ δ' ἐγίνοντο τοῦ δήμου ψηφισαμένου. Cf. Lipsius, *op. cit.*, p. 214, for a discussion of *probolé* and the definition of Pollux.

[5] Demos. xxi. 10; cf. Lipsius, *op. cit.*, p. 212, n. 118, and pp. 213 ff.

wrongdoer. In this case it would seem that the ecclesia ordered by decree that Callixenus and any others responsible for the miscarriage of justice be brought to trial. Five were brought before the ecclesia and committed to trial.

Probolai were normally brought into the ecclesia by the thesmothetai at the instance of a prosecutor. Whatever irregularities there were in the case of the generals are not important; for some individual must in any case have taken the initiative by introducing the original decree. The action of the assembly in committing the accused for trial instead of limiting itself to expressing an unfavorable opinion regarding them is of little consequence. In the last resort the ecclesia could do as it liked in its judicial capacity.[1]

Xenophon does not say that Callixenus and the others were sycophants, but in effect they were. Indeed, Suidas actually calls Callixenus a sycophant:

ἐναύειν· Καλλίξενος ὁ Ἀθηναῖος διὰ συκοφαντίαν ἆθλα ἀπηνέγκατο τῆς ἀναισχυντίας καὶ ἀσεβείας, ἐν ἄστει μισούμενος καὶ πενόμενος καὶ ἀποκλειόμενος λιμῷ ἀποθανεῖν· ἐπεὶ μήτε ὕδατος ἐκοινώνουν αὐτῷ μήτε πυρὸς ἐναύειν ἐβούλοντο, ὥσπερ οὖν κοινωνεῖν τοῖς βουλομένοις καὶ δεομένοις.

Diogenes Laertius[2] says that not long after the death of Socrates the Athenians felt such remorse that they put Meletus to death and banished the other accusers. If there is any truth in this statement, the charge must have been the same as in the proceedings against the prosecutors of the generals, *ἀπάτη τοῦ δήμου*. The story was apparently unknown to Xenophon, who has something to say of the fate of Anytus and his son who fell into evil ways: "So Anytus, even though dead, still enjoys an evil repute for his son's mischievous education and for his own hard-heartedness."[3] It seems that if Anytus had been banished Xenophon could hardly have failed to mention it in this connection. There is no place in the plan of Plato's *Apology*, *Crito*, *Euthyphro*, or *Phaedo* for any reference to the fate of Socrates' accusers.

[1] It is not impossible that we have here a contamination of *probolé* and *eisangelia*, which, if approved, regularly terminated in an indictment.

[2] ii. 43. [3] *Apol.* 30–31 (trans. Todd).

Isocrates and Aristotle agree that against sycophants there were both *probolai* and *graphai*. Aeschines also mentions *probolé:* *τῶν δὲ συκοφαντῶν ὡς κακούργων δημοσίᾳ προβολὰς ποιούμεθα.*[1] There was, according to Aristotle, regular provision for *probolé* of sycophants in the sixth prytany: *καὶ συκοφαντῶν προβολὰς τῶν Ἀθηναίων καὶ τῶν μετοίκων μέχρι τριῶν ἑκατέρων, κἂν τις ὑποσχόμενός τι μὴ ποιήσῃ τῷ δήμῳ.*[2] Among the *graphai* before the thesmothetai Aristotle mentions *γραφαὶ συκοφαντίας.*[3] It has been observed that Pollux identifies the two procedures: *προβολαὶ δὲ ἦσαν καὶ αἱ τῆς συκοφαντίας γραφαί.*[4] This loose and inexact expression[5] finds a measure of justification in the close relationship between *probolé* and *graphé* in practice. *Demosthenes* v. *Midias* is the leading case. Demosthenes first "presented" Midias to the assembly on a charge of assault and battery. The vote was against Midias. Demosthenes, with this prejudgment of the case in his favor, indicted Midias in the regular way. Had the people voted otherwise it is not at all likely that Demosthenes would have pushed the case. Similarly in the case of Callixenus *et al.*, the *probolé* was followed by the filing of an indictment, presumably a *γραφὴ ἀπάτης τοῦ δήμου.*[6] Perhaps a better case is that of Agoratus. He was charged with sycophancy in *δίκαι, γραφαί,* and *ἀπογραφαί: περὶ δὲ συκοφαντίας, ὅσας οὗτος ἢ δίκας ἰδίας συκοφαντῶν ἐδικάζετο ἢ γραφὰς ὅσας ἐγράφετο ἢ ἀπογραφὰς ἀπέγραφεν, οὐδέν με δεῖ καθ' ἕκαστον λέγειν.*[7] He was convicted and fined ten thousand drachmas. The procedure here described could be either *probolé* or *eisangelia* followed by a *γραφὴ συκοφαντίας.* Lofberg regards it as a *probolé.*[8]

Aristotle does not define sycophancy except in so far as he very clearly differentiates sycophants from those who make promises to the people which they do not fulfil. The fact that

[1] ii. 145.

[2] *Ath. Pol.* xliii. 5.

[3] *Ibid.* lix. 3.

[4] viii. 46.

[5] Cf. Latte, in Pauly-Wissowa, *s.v.* *Συκοφαντίας Γραφή.*

[6] Cf. Lipsius, *op. cit.*, pp. 214, 382.

[7] Lysias xiii. 65; *ἀπογραφή* was a favorite suit with prosecutors and sycophants.

[8] *Op. cit.*, p. 92. Latte (*op. cit.*) approves.

Aristotle paired the two types of offense shows that he realized how closely they were related. One is reminded of the definition of Aeschines: "It is *συκοφαντία* when one person, insinuating an accusation [*αἰτίαν ἐμβαλών*] into the minds of the people, calumniates a man in all the meetings of the assembly and before the senate."[1] Lipsius[2] thinks that "gegen Sykophantie nur dann Probole zulässig war, wenn durch sie das Volk selbst irregeleitet und zu unglücklichen Massnahmen verführt worden war." He cites the proceedings against Callixenus *et al.* as a case in point. This is undoubtedly true. There was a provision that six *probolai* against sycophants could be introduced in the "sovereign" (*κυρία*) assembly of the sixth prytany. Why the restriction to six? Could *probolai* be introduced at other meetings? Gilbert thinks they could.[3] Aristotle gives a list of the matters that must be provided for in the *agenda* of the *ἐκκλησία κυρία* in each prytany. He then proceeds:

> In the sixth prytany, in addition to the business already stated, the question is also put to the vote whether it is desirable to hold a vote of ostracism or not; and complaints against professional accusers [*συκοφαντῶν προβολάς*], whether Athenians or aliens domiciled in Athens [*τῶν μετοίκων*] are received, to the number of not more than three of either class, together with cases in which an individual has made some promise to the people and has not performed it.[4]

One is puzzled to understand how citizens and metics could alike be sycophants. It is clear that a metic could carry on private litigation under the aegis of his *prostatés*, but it is strange that he could be *ὁ βουλόμενος* and prosecute citizens. Even citizens could do so only if they were in full possession of their citizen rights. This difficulty has not escaped notice. Clerc[5] advances the theory that a metic could prosecute a public offender only when he himself was personally wronged. As a case in point, he cites the prosecution of Stephanus for false imprisonment as an adulterer by Epainetus of Andros.[6]

[1] ii. 145.

[2] *Op. cit.*, pp. 213 f.

[3] *Const. Antiqu.*, p. 303.

[4] *Ath. Pol.* xliii. 5 (trans. Kenyon).

[5] *Les Métèques athéniens*, pp. 113 f.

[6] Demos. lix. 64 ff.; cf. Hommel, in Pauly-Wissowa, *s.v.* "Metoikoi."

Perhaps Lysias, who prosecuted Eratosthenes on his audit, may be classed here because of the judicial murder of his brother by the Thirty.[1] But it is quite unlikely that there could be a sufficient number of such metics to warrant a charge of sycophancy against three each year.

It may be suggested that in the informal procedure of a *probolé* a metic might be "presented" as a sycophant, even though he was not actually engaged in litigation. A metic like Melas the Egyptian, as head of a group of sycophants,[2] might fall within the definition of a sycophant-agent and be liable for "presentation" without actually participating in a prosecution.

Sandys, in his note on the passage in Aristotle,[3] is of the opinion that a foreigner who desired to accuse anyone of an offense against the people was required to obtain special permission for that purpose from the proper authorities. But, as Lofberg points out,[4] the passages in Andocides upon which Sandys relies deal with immunity (ἄδεια). Such persons were really μηνυταί. A good example is Teucrus,[5] who turned state's evidence against those implicated with himself in the profanation of the Mysteries. In any event such cases could not have been frequent enough to produce sycophants of sufficient importance to rank with citizens. There were other ways of dealing more effectively with false informers.[6]

In a passage in Aristophanes there is a reference to prosecutors of some kind in the words:

[1] Lysias xii. Kahrstedt(*Studien zum Öff. Recht Athens*, I, 302) has some discussion of the metics and other aliens as prosecutors. The twelfth oration of Lysias does not fit into his theories, so he disposes of it as follows (p. 304, n. 1): The speech against Eratosthenes was written by Lysias for his *prostatés*. Afterward he published it as a "Broschüre" with such changes as were necessary to make it appear to be a speech of Lysias himself. This is a heroic measure for disposing of an inconvenient matter. Kahrstedt, moreover, offers no explanation of the importance of the metic as sycophant, unless he assumes that Aristotle (*Ath. Pol.* xliii. 5) is speaking of the time when in practice the *prostatés* had disappeared.

[2] Isaeus v. 19. [3] *Ath. Pol.* xliii. 5. [4] *Op. cit.*, p. 90.

[5] Andoc. i. 15: *δευτέρα τοίνυν μήνυσις ἐγένετο. Τεῦκρος ἦν ἐνθάδε μέτοικος, ὃς ᾤχετο Μέγαράδε ὑπεξελθών, ἐκεῖθεν δὲ ἐπαγγέλλεται τῇ βουλῇ, εἴ οἱ ἄδειαν δοῖεν, μηνύσειν περὶ τῶν μυστηρίων, συνεργὸς ὤν.*

[6] Dioclides was put to death (Andoc. i. 65–66).

ἐπὶ τοῖσιν ἀπράγμοσιν ὑμῶν
ἀντωμοσίας καὶ προσκλήσεις καὶ μαρτυρίας συνεκόλλων,
ὥστ' ἀναπηδᾶν δειμαίνοντας πολλοὺς ὡς τὸν πολέμαρχον.[1]

It is not easy to understand why citizens involved in litigation should rush to the polemarch for help,[2] and it is vain to speculate on the kind of aid they sought. It seems best to let the question rest. Lipsius[3] believes that in actual practice the metic was permitted to prosecute wrongdoers without the interference of a *prostatés*. Hommel goes even farther and says that metics became so closely associated with the citizen body "dass sich sogar die Sycophanten vielfach aus ihren Reihen rekrutierten."[4] This seems to be the correct view. It is quite natural, especially in the fourth century, that democracy should welcome aid from men who, though not citizens, had long been resident in Athens. They fought the enemies of Athens in the field: Why should they not be encouraged to attack public wrongdoers in the courts?

It can be assumed that sycophants were "presented" only once a year. If sycophants were such a curse as the reader of the orators and Aristophanes is led to believe, why such restraint? Two reasons may be suggested. The principal one is that a resolution regarding the alleged sycophancy of an individual was easy to put forward. No proof was needed, only denunciations. There must have been many οὓς πάντες

[1] *Wasps* 1040–42.

[2] The commentators afford little or no aid. Blaydes is satisfied with quoting the scholiast who adds nothing to Arist. *op. cit.* Van Leeuwen cites Aristotle and supposes that the harassed citizens are seeking aid against *peregrinos istos sophistas*, without suggesting what sort of aid they sought. Whether they are called sophists or sycophants is of little consequence. Without sophists there would have been few sycophants. Rogers refuses to offer any explanation. Starkie, too, is at a loss, but he conveniently cites several explanations offered which need not be repeated. He is right in saying: "We must suppose that the ἀπράγμονες sought his help against the alien sycophants." Lipsius (*op. cit.*, p. 64, n. 1) gives it up, but on p. 620, n. 1, he says in reference to *Wasps* 1042: "Bei dem es doch am nächsten liegt, mit Römer *Studien zu Aristophanes* S. 108 f. an eine γραφὴ ξενίας zu denken, mit der der bedrängte Bürger sich gegen Sycophanten wehrt." In the time of Aristotle (*Ath. Pol.* lix. 3) the thesmothetai introduced γραφαὶ ξενίας, but it may well have been different in the fifth century. Cf. Lipsius, *op. cit.*, p. 86, who uses Aristophanes' evidence in assigning the suit to the *nautodikai*.

[3] *Op. cit.*, pp. 791 f.

[4] *Op. cit.*

ἤδεσαν ἐν τῇ δημοκρατίᾳ ἀπὸ συκοφαντίας ζῶντας, to quote the words of Xenophon in describing the sycophants executed by the Thirty.[1] The public approval with which these measures met[2] shows that if a general charge of sycophancy as distinguished from an indictment based upon a specific law could be made at will by interested persons in the assembly even once a prytany, there was grave danger that the public service would suffer. If a man received an adverse vote in the ecclesia, his usefulness as a prosecutor would be impaired if not ruined. If the resolution failed, the mover was free from any kind of punishment. Freedom of prosecution in Athens, like the freedom of the press in modern communities, could not be endangered.

The use of *eisangelia* against sycophants is attested by Isocrates only. The process was available in any "sovereign" assembly. No certain instances of its use against sycophants are known. Aristotle does not mention it as a proceeding to be used against sycophants. The Thirty, it is true, had sycophants tried by the boulé. The process was *eisangelia*, but the administration of justice at that time was far from normal.[3]

There are no certain instances of γραφὴ συκοφαντίας except in connection with *probolé* in the cases of Callixenus *et al.* and Agoratus.[4] It is known that Aristogiton was once condemned for sycophancy: τί γὰρ ἂν γένοιτο συκοφαντίας καὶ παρανομίας δεινότερον, ἐφ' οἷς ἀμφοτέροις οὗτος ὤφληκεν;[5] There is no mention of the kind of process used, but the word ὤφληκεν affords a slight clue. It clearly implies a court action, viz., a γραφὴ συκοφαντίας. The close relationship between *probolai* and *graphai* perhaps explains the remark of Pollux: προβολαὶ δὲ ἦσαν καὶ αἱ τῆς συκοφαντίας γραφαί.[6] The *probolé* was a test of public sentiment. If it was unfavorable to the accused, an indictment and regular trial followed at the option of the pros-

[1] *Hell.* ii. 3. 12.

[2] *Ibid.* and Arist. *Ath. Pol.* xxxv. 2–3.

[3] Xen. *Hell.* ii. 3. 12: καὶ ἥ τε βουλὴ ἡδέως αὐτῶν κατεψηφίζετο. Cf. *supra*, I, 332.

[4] Xen. *Hell.* i. 7. 35; Lysias xiii. 65.

[5] Demos. xxv. 19.

[6] viii. 46.

ecutor. In exceptional cases a ψήφισμα might be introduced providing for a trial.

Pollux mentions "denunciation" (φάσις) as a process used against sycophants.[1] It at once arouses suspicion. Lofberg[2] suggests that "it was probably employed against those who made a business of attacking merchants and traders by bringing φάσεις against them." This is in agreement with the view of Lipsius.[3] The explanation may lie in the desire to protect commerce and mining by allowing the use of a process that brought some profit to the successful prosecutor of this type of sycophant, the half of the fine levied. But it is a matter for suspicion that Isocrates[4] did not add it in his list of processes against sycophants. It would have strengthened his argument. That special care was taken to protect merchants and shipowners from sycophants is shown by the laws cited in *Epichares* v. *Theocrines*.[5] The text of the law is not preserved, but the speaker discusses it at some length. It was aimed at those who "presented" merchants and shipowners. The law absolutely forbade one to "present" (φαίνειν) a merchant or shipowner: *εἰ μὴ πιστεύει τις αὐτῷ δείξειν ἐν ὑμῖν γεγενημένα περὶ ὧν ποιεῖται τὴν φάσιν· ἐὰν δέ τις παρὰ ταῦτα ποιῇ τῶν συκοφαντούντων, ἔνδειξιν αὐτῶν εἶναι καὶ ἀπαγωγήν.* The only proof of sycophancy in this type of case would be the failure to persuade at least one-fifth of the jury. If a prosecutor took action immediately after the counting of the votes, the alleged culprit could be arrested summarily (ἀπαγωγή) as one caught in the act. If there was any delay, the prosecutor must then proceed by ἔνδειξις.[6] The penalty would in all probability be determined by the jury in addition to the penalty of one thousand drachmas:

ὅτι δ'οὐ ταῖς χιλίαις μόνον ἔνοχός ἐστιν ἀλλὰ καὶ ἀπαγωγῇ καὶ τοῖς ἄλλοις, ὅσα κελεύει πάσχειν ὁ νόμος οὐτοσὶ τὸν συκοφαντοῦντα τοὺς ἐμπόρους καὶ τοὺς ναυκλήρους, ῥᾳδίως ἐξ αὐτοῦ τοῦ νόμου γνώσεσθε.[7]

[1] viii. 47.

[2] *Op. cit.*, p. 92.

[3] *Op. cit.*, p. 314.

[4] xv. 314.

[5] Demos. lviii. 10–11.

[6] Pollux viii. 49; cf. Lipsius, *op. cit.*, p. 329.

[7] Demos. lviii. 10.

In the nature of the case sycophants could rarely avail themselves of δίκαι. But there are some examples, such as the case of Callimachus in Isocrates.[1] He brought a charge of homicide against an opponent. The case failed utterly when the woman alleged to have been slain was produced alive in court. Another suit for manslaughter prosecuted by an alleged sycophant was that of the choregus in Antiphon.[2] A client of Lysias[3] was charged before the Areopagus with wounding with intent to kill on what were claimed to be very trivial grounds. A similar case is dealt with in the third oration of Lysias. But neither of these cases is conclusive. In *Theomnestus* v. *Stephanus* the plaintiff recalls that the defendant brought a charge of homicide against the notorious Apollodorus. His account of it is as follows:

> He wished to drive Apollodorus into exile from his country. He brought a false charge against him, that he had once gone to Aphidna in search of a runaway slave that belonged to him, and that he had there given a blow to a woman, and that she had died of it; and he suborned some slaves and got them to represent that they were Cyrenaeans, and gave notice to Apollodorus to appear on a charge of murder in the court of Palladium. And Stephanus conducted the prosecution, and affirmed on oath that Apollodorus had killed the woman with his own hand, imprecating destruction upon himself and his race and his house, affirming facts which never took place, and which he never saw nor heard from any human being.[4]

In Isaeus the claimant to an estate is said to have "acted at the instigation of Melas, the Egyptian whose advice he followed in everything."[5] Presumably Melas was to receive a share of the estate for his services. This may be inferred from the speaker's statement that some friends never received from Dicaeogenes "money they had lent him, others were deceived by him and did not receive what he had promised to give them if he should have the estate adjudicated to

[1] xviii. 52. [2] vi. [3] iv.

[4] Demos. lix. 9 ff. (trans. Kennedy).

[5] v. 7–9, 40. Melas was probably a resident alien; cf. Wyse, *The Speeches of Isaeus*, p. 415.

him." Perhaps the wrongdoing of Melas and other friends of the claimant consisted in perjury only.[1]

The encouragement of strife and litigation is injurious to the public interests. One count in the indictment of the sycophant is that he was responsible for unnecessary litigation. In the *Son of Tisias* v. *Callicles* the plaintiff claims that his opponent is a sycophant.[2] In all probability Callicles had merely shown himself resourceful in finding various causes of action against the son of Tisias for the purpose of ruining him and getting possession of his farm. He was assisted by claims put forward by Callicrates and a cousin. Such a man was doubtless, in the words of the speaker, "a bad and grasping neighbor,"[3] but scarcely a sycophant in any reasonable legal sense of the word.

The laws against sycophants had to be set in motion by volunteer prosecutors. Naturally, the victims of sycophants would be the first to avail themselves of these laws for their own protection unless they happened to be peaceable (ἀπράγμονες) men who shrank from litigation and preferred to pay for protection. In the *Memorabilia*,[4] Xenophon has preserved an instructive account of how Crito, upon the advice of Socrates, availed himself of the services of Archedemus, who, like a modern lawyer, proceeded to attack the sycophants with their own weapons to the great advantage of Crito and those of his friends who employed Archedemus.

> I remember that he once heard Crito say that life at Athens was difficult for a man who wanted to mind his own business. "At this moment," Crito added, "actions are pending against me not because I have done the plaintiffs an injury, but because they think that I would sooner pay than have trouble."

[1] One is inevitably reminded of the common-law crimes of champerty and maintenance. "Maintenance is the officious intermeddling in a suit that in no way belongs to one by maintaining or assisting either party with money or otherwise to prosecute or defend it"; "Champerty is a bargain with a plaintiff or a defendant to divide the land or other matter sued for between them if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense" (Clark, *Criminal Law*, p. 322).

[2] Demos. lv. 1–2.

[3] In § 31 he is said to have forged a document.

[4] ii. 9.

"Tell me, Crito," said Socrates, "do you keep dogs to fend the wolves from your sheep?"

"Certainly," replied Crito, "because it pays me better to keep them."

"Then why not keep a man who may be able and willing to fend off the attempts to injure you?"

"I would gladly do so were I not afraid that he might turn on me."

"What? don't you see that it is much pleasanter to profit by humoring a man like you than by quarrelling with him? I assure you there are men in this city who would take pride in your friendship."

Thereupon they sought out Archedemus, an excellent speaker and man of affairs, but poor. For he was not one of those who make money unscrupulously, but an honest man, and he would say that it was easy to take forfeit from false accusers. . . . . He soon found out that Crito's false accusers [*τῶν συκοφαντούντων τὸν Κρίτωνα*] had much to answer for and many enemies. He brought one of them to trial on a charge involving damages or imprisonment. The defendant, conscious that he was guilty on many counts, did all he could to get quit of Archedemus. But Archedemus refused to let him off until he withdraw the action against Crito and compensated him. Archedemus carried through several other enterprises of a similar kind; and now many of Crito's friends begged him to make Archedemus their protector, just as when a shepherd has a good dog the other shepherds want to pen their flocks near his, in order to get use of his dog. Archedemus was glad to humor Crito, and so there was peace not only for Crito but for his friends as well.[1]

[1] *Ibid.* (trans. Marchant).

CHAPTER IV

SPECIAL PLEAS

When a defendant appeared before the magistrate, judicial official, or board and joined issue with the plaintiff on the merits of the case, the proceeding was known as *εὐθυδικία*.[1] If, however, the defendant claimed that in law the issue was not actionable (*μὴ εἰσαγώγιμον εἶναι τὴν δίκην*), he was privileged to enter a special plea which, in fourth-century practice at least, was tried separately.[2] Special pleas and de-

[1] Isaeus vi. 3; vii. 3; Demos. xxxiv. 4.

[2] Doubtless the judicial official or board before whom the case was brought had the right to refuse to take the case to court if for good and sufficient reasons it was not deemed *εἰσαγώγιμος*; cf. Lipsius, *Das Attische Recht*, pp. 819, 845; *supra*, I, 289. The basis upon which a magistrate could summarily reject a plaint has been well stated by Calhoun, *CP*, XIV, 343–44: "The magistrate knows the laws governing the admissibility of actions, for he is in possession of official copies. That is to say, he knows what several actions fall within his jurisdiction, the times at which they may properly be instituted, and the persons in whom the right of action is reposed as well as the issues of fact that may properly be raised by the plaintiff's declaration in each several action. These laws he applies to facts of which he takes judicial notice, or those which appear on the face of the complaint, or are conclusively established by admissions of the plaintiff, or by the plaintiff's refusal to plead. If any of these facts, so established, constitutes a bar to the admissibility of the action, he has no choice but to dismiss the suit at whatever point in the proceedings its inadmissibility is established. But if its inadmissibility is not so established, and an issue of fact is properly tendered by the plaintiff, the magistrate cannot dismiss the action." There is no good ground for supposing, as Calhoun does (p. 340, n. 1), that a magistrate would reject a complaint because it was barred by the "statute of limitations." The claim of Apollodorus against Phormio was outlawed, yet it came to trial even in the face of the opposition of Phormio (Demos. xxxvi, 26–27).

There is one recorded case in which the king archon rejected a charge of murder, not because it did not come within his jurisdiction but because it was so late in the year that there was not time enough to hold the three *προδικασίαι* which, according to law, must be held a month apart (Antiph. vi. 38, 42). The plaintiff complained but took no action: *καὶ ὅτι οὐκ ἠδίκει αὐτούς, μέγιστον σημεῖον· Φιλοκράτης γὰρ οὑτοσὶ ἑτέρους τῶν ὑπευθύνων ἔσειε καὶ ἐσυκοφάντει, τούτου δὲ τοῦ βασιλέως, ὃν φασι δεινὰ καὶ σχέτλια εἰργάσθαι, οὐκ ἦλθε κατηγορήσων εἰς τὰς εὐθύνας* (*ibid.* 43).

It would also seem that if a complaint or indictment was not properly drawn, the magistrate could require it to be amended. In *Dionysius* v. *Agoratus*, an *ἀπαγωγή* before the Eleven, the plaintiff was required to insert the words *ἐπ' αὐτοφώρῳ* in the indictment. If he had refused, it is manifest that the Eleven would not have

murrers of English law and *exceptio fori* of Roman law were in Attic law variously denominated as ἀντιγραφή, παραγραφή, and διαμαρτυρία. Early in the fourth century ἀντιγραφή disappeared from Athenian practice, and the διαμαρτυρία was used only in inheritance cases, while παραγραφή was used for all other cases. In the following pages an attempt is made to trace the earlier history of these pleas and describe their working in practice.

In the scanty records of fifth-century litigation there are no certain references to special pleas of any kind. In a speech of Isocrates which Blass puts in the year 399 B.C.,[1] the διαμαρτυρία is mentioned as a procedure quite familiar to the dicasts.[2]

The procedure in a *diamartyria* was as follows.[3] If the defendant pleaded that the case was not actionable, the prosecutor had the right to put forward a witness to support his claim that the case was actionable. The defendant must now prosecute the witness for perjury. If he succeeded, the plaintiff might be totally debarred or compelled to change his procedure or his plaint. If the witness was acquitted, the original case as filed went to trial. This type of procedure is well illustrated in *Aristodicus* v. *Pancleon*.[4] Aristodicus brought action against Pancleon before the polemarch. The nature of the case is unknown. In his rejoinder the defendant pleaded that since he was a Plataean and consequently in

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accepted the indictment (Lysias xiii. 85–87; Lipsius, *op. cit.*, p. 819; Calhoun, *op. cit.*, pp. 342–43). In a claim for an estate the speaker was obliged in the *anakrisis* to add to his pleading that his mother was the sister of the testator. Otherwise it seems his claim would have been rejected. In this way he claimed the estate not as the grandson of Aristarchus I, the testator, but as the nephew of Aristarchus II, who was in possession (Isaeus x. 2; cf. Wyse, *The Speeches of Isaeus*, p. 651; Lipsius, *op. cit.*, p. 819, n. 55; Calhoun, *op. cit.*, p. 343).

[1] Isoc. xviii; it has been variously dated from 403 to 397 B.C.: cf. Blass, *Attische Beredsamkeit*, II, 214; Jebb, *Attic Orators*, II, 235.

[2] For the moment the date of the διαμαρτυρία is postponed.

[3] The fullest account is found in Harpocration, *s.v.* διαμαρτυρία; cf. Wyse, *op. cit.*, pp. 233 ff.

[4] The unknown speaker of Lysias xxiii, entitled κατὰ Παγκλέωνος ὅτι οὐκ ἦν Πλαταιεύς, gives an account in §§ 13–14 of a previous suit brought by Aristodicus against Pancleon and tells the result.

possession of Athenian citizen rights the case should not come before the polemarch. Aristodicus thereupon produced a witness who testified that Pancleon was not a Plataean. Pancleon denounced the witness (ἐπισκηψάμενος) but did not prosecute him. Consequently the case was tried before the polemarch. The plaintiff won the suit.

An example of the opposite type of proceeding where the defendant supported his plea by a witness is found in Isocrates.[1] Callimachus brought action against the speaker as being responsible for the confiscation of a sum of money by the Ten who succeeded the Thirty. The speaker agreed to settle the case by the payment of two minas. The agreement was sanctioned in a δίαιτα ἐπὶ ῥητοῖς. Such an arbitration was as binding as any other and rendered the matter *res judicata*. Callimachus, disregarding this legal settlement, again sued the speaker, who pleaded the arbitration in bar of action and supported his rejoinder by a witness. Callimachus did not denounce or prosecute the witness. The case was in consequence dismissed but in some to us unknown fashion he re-entered the same suit (πείσας δὲ τὴν ἀρχὴν πάλιν τὴν αὐτὴν δίκην ἐγράψατο).[2] The defendant met the new action by pleading that it was contrary to the amnesty, and entered a *paragraphé* according to the recent law of Archinus: ἄν τις δικάζηται παρὰ τοὺς ὅρκους, ἐξεῖναι τῷ φεύγοντι παραγράψασθαι, τοὺς δὲ ἄρχοντας περὶ τούτου πρῶτον εἰσάγειν, λέγειν δὲ πρότερον τὸν παραγραψάμενον.[3] The *paragraphé* was tried separately and the defendant spoke first.

This is one of the earliest if not the first case that came under the law of Archinus, as is indicated by the opening words of the speaker:

> εἰ μὲν καὶ ἄλλοι τινὲς ἦσαν ἠγωνισμένοι τοιαύτην παραγραφήν, ἀπ' αὐτοῦ τοῦ πράγματος ἠρχόμην ἂν τοὺς λόγους ποιεῖσθαι· νῦν δὲ ἀνάγκη περὶ τοῦ νόμου πρῶτον εἰπεῖν καθ' ὃν εἰσεληλύθαμεν, ἵν' ἐπιστάμενοι περὶ ὧν ἀμφισβητοῦμεν τὴν ψῆφον φέρητε, καὶ μηδεὶς ὑμῶν θαυμάσῃ, διότι φεύγων τὴν δίκην πρότερος λέγω τοῦ διώκοντος.[4]

[1] xviii. 11.

[2] *Ibid.* 12; cf. Lipsius, *op. cit.*, p. 857, n. 41.

[3] Isoc. xviii. 2.

[4] *Ibid.* 1.

The law belongs to the archonship of Euclides, 403/2 B.C.[1] It has been pointed out that the words τοιαύτην παραγραφήν (this kind of *paragraphé*), as used by Isocrates, indicate that a *paragraphé* is not a novelty to the dicasts.[2] The novelties are the reversal of the order of the speeches and the application of a *paragraphé* to cases brought contrary to the amnesty in the opinion of the defendant. There is no reference to a *paragraphé* before Isocrates' speech against Callimachus, but this does not prove that it did not occur. In the Herodes murder case in Antiphon, about 416 B.C., the defendant argues that he should not be tried as a κακοῦργος before the Eleven but as a homicide in the Palladium.[3] Although the technical argument is treated separately in the speech from the proof of his innocence, this does not amount to a special plea argued before the main issue was tried. But the resemblance struck the author of the Hypothesis, who says the defendant τὸ μὲν τῆς κακουργίας ἔγκλημα ἀπολύεται παραγραφικῶς. This case does not prove that *paragraphé* did not exist at this time. It merely indicates that it would not be used in *endeixis*.[4]

Some time in the early part of the fourth century the *paragraphé* used in amnesty cases was extended to practically all civil suits, with the exception of cases involving the devolution of estates in which a special plea was still managed by *diamartyria*. All special pleas in the speeches in the Demosthenic corpus, with the exception of an inheritance case, are *paragraphai*. A different type of special plea called ἀντιγραφή is found in the Pancleon case of Lysias.[5] The speaker summoned Pancleon as Aristodicus had previously done[6] before the polemarch. Pancleon entered a demurrer, an *ex-*

[1] Cf. Lipsius, *op. cit.*, p. 846.

[2] Calhoun, *CP*, XIII, 170.

[3] Antiph. v. 8 ff., 16, 95–96.

[4] Calhoun, *op. cit.*, pp. 170 ff.

[5] Lysias xxiii. The speech is of uncertain date, but must belong to the fourth century. It in all probability antedates the extension of *paragraphé* to other than amnesty cases. Wilamowitz (*Aristoteles und Athen*, II, 368 ff.) has shown that this speech is genuine and has analyzed it in a very satisfactory manner.

[6] *Ibid.* 13–14.

ceptio fori, called ἀντιγραφή.[1] The plaintiff spoke first and devoted his speech entirely to proving that Pancleon was not a Plataean. Not a word is said about the main issue, which is quite distinct as the words τῆς τε ἀντιγραφῆς ἕνεκα ταυτησὶ καὶ αὐτῆς τῆς δίκης show. It has been noted that in this speech alone in Lysias the speaker when introducing a witness always says καί μοι ἐπίλαβε τὸ ὕδωρ. This would seem to indicate that the time allowed for the speech was quite brief.[2]

Aside from *Aristodicus* v. *Pancleon*[3] and the *diamartyria* referred to in the Callimachus case of Isocrates,[4] there are no examples of *diamartyria* except in inheritance cases. The *paragraphé* of Archinus was apparently extended to all civil cases except devolution of estates, ἐπιδικασίαι or διαδικασίαι κλήρου. For such cases a *diamartyria* (oath by a witness) to the effect that μὴ ἐπίδικον εἶναι τὸν κλῆρον ὄντων παίδων γνησίων[5] was particularly effective. If the witness was acquitted of perjury, the claimants of necessity abandoned their pretentions and the child or children remained in possession.[6] This applied not only to the present claimants but to future claimants. This was a simple and convenient process in a *diadikasia* where several claimants who based their claims on different grounds might appear. Under these circumstances it seems likely that the convenience and practical advantages to be derived from *diamartyria* rather than any legal requirement determined its use in inheritance cases.[7] So far as the *paragraphé* is concerned, no one with any familiarity with litigation would have used it to protect himself in the possession of an estate against several claimants. In a *diadikasia* there are, strictly speaking, neither plaintiffs nor defendants. Consequently even if the law permitted a *paragraphé* the pro-

[1] *Ibid.* 10; cf. 5: ἐπειδὴ δέ μοι αὐτὴν ἀντεγράψατο μὴ εἰσαγώγιμον εἶναι.

[2] Cf. Wilamowitz, *op. cit.*

[3] Lysias xxiii. 13–14; cf. *supra*, pp. 76 f.

[4] xviii. 11; cf. *supra*, p. 77.

[5] Demos. xliv. 46.

[6] Cf. Calhoun, *op. cit.*, pp. 176–77.

[7] *Ibid.*, p. 178, n. 1, as against Leisi, *Der Zeuge*, p. 29, and Beauchet, *Histoire du droit privé de la République athénienne*, III, 596, n. 2.

cedure would be tedious and the result might be inconclusive.[1]

It would seem reasonable to suppose that special pleas argued separately would be as desirable in criminal as in civil cases. Such was the view expressed by Meier-Schömann-Lipsius in *Der Attische Process*.[2] The only evidence cited for this view is the reference to a *graphé* in Harpocration, *s.v.* διαμαρτυρία: οἱ νόμοι κελεύουσι διαμαρτυρεῖν ἐπὶ ταῖς γραφαῖς ταῖς τοῦ ἀπροστασίου τὸν βουλόμενον ὁμοίως τῶν ξένων καὶ τῶν ἐπιχωρίων. Glotz accepts this view without discussion.[3] Lipsius was the first to doubt the occurrence of either *diamartyria* or *paragraphé* in public cases.[4] But he merely gives the reasons for his doubts without attempting to settle the question. But Calhoun[5] has made it quite clear that the law of Archinus did not apply to criminal cases. Much weight is given to the fact that the terminology of the law of Archinus is applicable only to civil suits. In the section of this law cited by Isocrates,[6] which seems to be a genuine quotation,[7] two words occur which in a law could refer only to a civil process. They are δικάζηται[8] and ἐπωβελία. If either party lost a *paragraphé* he forfeited to his opponent one-sixth of the amount at issue. In a public suit this *poena temere ligantium* took the form of a fine of one thousand drachmas and denial of the right to bring a similar *graphé*, *endeixis*, *apagogé*, etc., in the future if the prosecutor failed to obtain at least one-fifth of the votes.[9]

[1] Cf. Calhoun, *op. cit.*, pp. 176 f., for the difficulty if not the impossibility of using a *paragraphé* in an inheritance case. There is, however, a possibility that if, at a subsequent time, a claimant appeared and sued for an estate settled by a *diamartyria*, a *paragraphé* might be the simplest way of handling the case. It would be a choice between another *diamartyria* with the attendant risks and a *paragraphé* pleading the previous acquittal of the witness in bar of action; cf. *ibid.*, p. 173, n. 10.

[2] P. 841.

[3] Darem.-Saglio, *s.v.* "Paragraphé."

[4] *Op. cit.*, p. 858.

[5] *Op. cit.*, pp. 179 ff.

[6] xviii. 2, quoted *supra*, p. 77.

[7] Cf. Calhoun, *op. cit.*, p. 170; Hommel, *Berl. Phil. Woch.*, XLIV, 541.

[8] Calhoun, *op. cit.*, p. 183, n. 4; Hommel, *op. cit.*, p. 543.

[9] Lipsius, *op. cit.*, p. 940.

It is significant that in the records of litigation there is no instance of *paragraphé* in a public suit.[1] Andocides does not resort to a *paragraphé* though he appeals to the spirit of the amnesty. After praising the moderation of the citizens in the amnesty which both friends and foes recognized, he asks not as a right but as a favor that they deal with his case in the same spirit: *μὴ μεταγνῶτε, μηδὲ βούλεσθε τὴν πόλιν ἀποστερῆσαι ταύτης τῆς δόξης.*[2] Agoratus[3] without doubt appeals to the amnesty in his defense against an *apagogé* for homicide. "I understand," says the prosecutor, "that he intends to refer to the oaths and agreements, and will tell us that his prosecution is a violation of the oaths and agreements that we of the Piraeus contracted with the party of the town." The fact that the prosecutor speaks first, however, shows that Agoratus did not resort to the *paragraphé* provided by the law of Archinus. In spite of the sophistical arguments of the prosecutor[4] to the contrary, Agoratus should have been protected by the amnesty.[5] In the *dokimasia* cases in Lysias[6] there is only one direct reference to the amnesty. The accuser of Evandros[7] says that he hears that Evandros *καὶ τὰς συνθήκας ὑμᾶς ὑπομνήσειν.* In Lysias xxxi there is no direct mention of the amnesty but merely the vaguest reference to the spirit of reconciliation.

The case of Philo of Coele shows how criminal cases, brought into court contrary to the amnesty, were handled: *ἐνδειχθέντα παραπρεσβεύεσθαι, καὶ περὶ μὲν τοῦ πράγματος οὐδὲν ἔχοντα ἀπολογήσασθαι, τὰς δὲ συνθήκας παρεχόμενον, ἔδοξεν ὑμῖν ἀφεῖναι καὶ μηδὲ κρίσιν περὶ αὐτοῦ ποιήσασθαι.*[8] Philo did not deny the facts but merely claimed the protection of the

[1] For the moment the discussion of *diamartyria* in public suits is deferred.

[2] Andoc. i. 140. [3] Lysias xiii. 88. [4] *Ibid.* 88–89.

[5] Cf. Frohberger-Thalheim (*Lysias Reden*, I, 73–74), who admits the applicability of the amnesty but believes that he might have entered a *paragraphé*.

[6] xvi, xxv, xxvi, xxxi; cf. Cloché, *REG*, XXIX, 24–25. [7] xxvi. 16.

[8] Isoc. xviii. 22. *ἔνδειξις* here is used in a general sense of "indictment" (Lipsius, *op. cit.*, p. 335, n. 65). Normally a case of *παραπρεσβεία* would come to the thesmothetai from the *euthynai*, if the system of *euthyna* described by Aristotle (*Ath. Pol.* xlviii. 3–5) was in force at the time (Lipsius, *op. cit.*, p. 398, n. 88).

amnesty and was discharged without trial. It is hard to see just why the case ever came to court. The magistrates before whom such cases were filed had the power to refuse to accept them.[1] According to Andocides,[2] *ἀγράφῳ δὲ νόμῳ τὰς ἀρχὰς μὴ χρῆσθαι μηδὲ περὶ ἑνός*. As it did come to court, the probable procedure was as follows. The prosecutor made his charge and Philo replied that the charge was correct and claimed the protection of the amnesty which was granted by the court in some fashion that justified Isocrates in saying that there was no trial. In any event there was no *paragraphé* in which the accused spoke first.

It is not wise to pay too much attention to Andocides' discussion of the amnesty law. For example, he is manifestly wrong when he says that Meletus, who assisted in the arrest of Leon of Salamis, was safe from a charge of homicide or *βούλευσις* at the hands of the sons of Leon *ὅτι τοῖς νόμοις δεῖ χρῆσθαι ἀπ' Εὐκλείδου ἄρχοντος*.[3] His immunity depended upon the fact that only those who murdered *αὐτοχειρίᾳ* could be tried for murder. It is also doubtful whether this law, as interpreted by Andocides, provided complete immunity for all offenses which antedated the restoration of democracy after the overthrow of the Thirty.[4] The case of Philo and the considerations drawn from the terminology of the law of Archinus are amply sufficient proof that *paragraphé* did not apply to public cases.[5]

The date of the introduction of *diamartyria* is undetermined. It was a well-known process at the time of the delivery of Isocrates' eighteenth speech and was undoubtedly older than the *paragraphé* of Archinus. In Isocrates xviii, where the *paragraphé* of Archinus is spoken of as a novelty to the dicasts, the procedure of *diamartyria* is quite familiar to them. This would seem to indicate that it was in use before the archonship of Euclides. Glotz,[6] speaking of the relative

[1] Cf. *supra*, p. 75, n. 2. [2] i. 89. [3] i. 94.

[4] Calhoun, *op. cit.*, pp. 181 f.; cf. Schreiner, *De corpore iuris Atheniensium*, pp. 92 ff.; Hommel, *op. cit.*, pp. 543 f.; Platner, *Process und Klagen*, I, 157.

[5] Cf. Hommel, *op. cit.* [6] *Op. cit.*

antiquity of *paragraphé* and *diamartyria*, says: "Des deux procédures, la plus ancienne est celle de la διαμαρτυρία, qui semble une vague survivance de l'antique cojuration." This is a most attractive suggestion. We have in *diamartyria* one of the most striking survivals of compurgation to be found in Athenian law. It has some affinities with the evidentiary oath out of which it grew.[1] The evidentiary oath began as an exculpatory oath allowed to the defendant alone; soon it was allowed to the plaintiff as well. This feature appears in *diamartyria* also.[2] In *Aristodicus* v. *Pancleon*,[3] the plaintiff resorts to a *diamartyria;* in the Callimachus case[4] the defendant presents a witness. When *paragraphé* displaced *diamartyria* in all private suits except inheritance cases, in practice it is always the direct heirs who resort to a *diamartyria*. In theory there is no reason why the claimants might not each have a witness testify to the contrary—that the estate is subject to claim at law (ἐπίδικος) because there are no heirs. But such a proceeding would be cumbersome and would entail dangers for the witnesses and the claimants. We may be sure that it is not a matter of accident that in the records of inheritance cases there are no references to a *diamartyria* of claimants.

In addition to its use in inheritance cases, *diamartyria* continued to be used in public suits. Harpocration[5] speaks of *diamartyria* in connection with γραφαὶ ἀπροστασίου. This process was intended to punish a resident alien who had not registered his *prostatés* as the law required. Here ὁ διαμαρτυρῶν of the plaintiff might tesify that there had been no registration and the metic would have to prove his case by prosecuting the witness for perjury. The procedure puts the burden of proof upon the defendant, who now becomes the plaintiff. Presumably the defendant also had the right to put forward a witness to testify, for example, that he was not in

[1] On the analogy of διωμοσία, an oath taken by both parties at the *anakrisis*, διαμαρτυρία means a deposition that could be offered by both sides. It is nowhere said explicitly that the witness to a *diamartyria* was sworn, but it seems wholly improbable that such an important witness would not be sworn.

[2] Cf. *infra*, p. 190. [3] Lysias xxiii. 13–14. [4] Isoc. xviii. 11.

[5] *S.v.* διαμαρτυρία; cf. Wyse, *op. cit.*, pp. 233 ff.

fact a resident alien and consequently had done no wrong in not registering a *prostatés*. We have a speech of Lysias entitled πρὸς τὴν Ἀριστοδήμου γραφὴν διαμαρτυρία.[1] Here obviously the *diamartyria* is that of the defendant to meet the charge of Aristodemus.

More than one hundred types of suits, public and private, are mentioned in the sources. These were distributed among a dozen or more magistrates, judicial officials, and boards. The distribution of suits has been worked out pretty satisfactorily in modern handbooks, but there are still difficulties. The average Athenian citizen who as dicast, litigant, presiding officer, or spectator became more or less familiar with procedure could easily, with the aid of friends and legal advisers,[2] select the right procedure. Mistakes in seeking the proper court could be corrected by the officials who entered cases for trial, but prosecutors might successfully insist, as in the two cases against Pancleon,[3] and have the case filed as they wished. In some cases the Athenian code offered a choice of remedies for a grievance.

> Solon provided not one but many ways of proceeding against wrongdoers. . . . . Take theft for example. Are you able-bodied and confident in yourself? Take a thief to prison: but you risk the penalty of a thousand drachmas. Are you not strong? Take the magistrates with you; they will do it. Are you afraid of this too? Indict him. Do you distrust yourself and are you too poor to pay a thousand drachmas? Sue him for larceny before the arbitrator, and you will run no risk. None of these courses is the same. For impiety in like manner you may take to prison, indict, sue before the Eumolpids, or lay information before the king. And in all other cases the situation is much the same."[4]

A resourceful opponent was always ready to make capital out of any false or unwise step on the part of a plaintiff or prosecutor. "It is the practice with defendants," says Demosthenes,[5] "who have done wrong, in order to defeat the proceedings against them, to suggest that some other proceedings which are not practicable should have been adopted." But he adds that sensible dicasts should pay no

[1] *Frag.* xv (Baiter and Sauppe).

[2] Cf. *supra*, pp. 15 ff.

[3] Cf. *infra*, pp. 110 f.

[4] Demos. xxii. 25 ff.

[5] xxi. 27.

attention to them. The extent to which defendants were willing to go in order to prejudice the dicasts against those who resorted to special pleas is well exemplified in two cases in the Demosthenic corpus. Lacritus, a merchant of Phaselis, demurred to a claim made by an Athenian moneylender that he was not liable for the money because there was no contractual relationship between himself and the plaintiff. The speech of the plaintiff who has become the defendant in a *paragraphé* opens as follows:

> The Phaselites are doing nothing new, men of Athens, only what they are in the habit of doing. They are famous people for borrowing money on your exchange, but when they have got it and have drawn up a maritime contract they immediately forget their contract and the laws, and consider that if they pay their debt it is like losing something of their own, and, instead of paying, they resort to sharp practices, special pleas, and excuses.[1]

This is mere denunciation. The whole case is weak, as the author of the hypothesis observes: *πρὸς δὲ τὴν παραγραφὴν ἀσθενέστερον ἀπήντηκε διὰ τὸ πρᾶγμα τὸ πονηρόν.* A similar denunciation against *diamartyria* is found in another speech attributed to Demosthenes:

> Of all methods of trial this by an exceptive affidavit [special plea] is the most unjust, and the parties who resort to it are most deserving of your displeasure, as you will clearly see by what I am about to say. In the first place, it is not necessary, as other processes are; it takes place only by the choice and desire of the party who swears the affidavit. If there is no other way of getting judgment upon disputed claims, unless you swear an affidavit of this sort, perhaps it is necessary to swear one. But, if it is possible to obtain a hearing before all tribunals without an exceptive affidavit, is not such a step a mark of recklessness and complete desperation? The legislator did not make it obligatory upon the contending parties; he allowed them to put in an exceptive affidavit, if they pleased, as if he were putting our several characters to proof, to see how far we are inclined to a reckless course of action. Observe also: if parties putting in these special pleas had their way, there would be neither courts of justice nor causes for them to try; for it is of the very essence of exceptive affidavits to put a stop to all proceedings, and to prevent questions being brought before the court; such at least is the intention of the parties who swear them. Therefore, I consider that such persons should be regarded as the common enemies of all.[2]

[1] Demos. xxxv. 1 ff.

[2] xliv. 57 ff.; cf. Isaeus iii. 3; vi. 43.

In the cases of Isaeus, *diamartyria* is a common proceeding. In one case a preposterous objection to a *diamartyria* is made:

> Androcles here put in a protestation declaring that the succession was not adjudicable, thus depriving my client of his right to claim the estate and you of your right to decide who ought to be declared heir to Philoctemon's property. He thus thinks by a single verdict and by a single suit to establish as brothers of the deceased men who have no sort of connexion with him, to place himself in possession of the estate without further legal procedure, to become the legal representative of the sister of the deceased.[1]

It so happens that we know that Chaerestratus, the claimant who uttered these words, did not win his case. In an inscription of the period he is described as the "son of Phanostratus," whereas if he had won he would have been described as Χαιρέστρατος Φιλοκτήμονος Κηφισιεύς.[2]

There are indications that a litigant who used a special plea felt that it was desirable to defend his action. In the Pantaenetus case[3] the speaker says that if he had failed to resort to a special plea his opponent would have been enabled to respond that if there had actually been a discharge and quittance the defendant would undoubtedly have entered a special plea.

In the second oration of Isaeus Menecles II is represented as defending his father-in-law against a charge of perjury for evidence given by the latter in Menecles' previous *diamartyria*. There is, however, nowhere in the speech any sign or hint that the speaker felt there was any prejudice against a *diamartyria*. We may assume, then, that *diamartyria* was a normal procedure in inheritance cases and that in spite of occasional criticisms on the part of prosecutors of witnesses there is no evidence that the dicasts were in any way prejudiced against a *diamartyria*.

The law looked with disfavor, however, upon demurrers and special pleas that were not well founded. Reckless use of them was discouraged by the imposition of substantial finan-

[1] Isaeus vi. 4.

[2] *IG*², II, 2825. 11; cf. Wyse, *op. cit.*, p. 488.

[3] Demos. xxxvii. 1.

cial penalties. In inheritance cases contestants for an estate had to deposit a sum of money (παρακαταβολή) amounting to one-tenth of the value of the estate which in case of failure was forfeit to the state.[1] In a *diamartyria*, if the prosecutor of the witness failed to obtain at least one-fifth of the votes he forfeited one-sixth of the amount claimed (ἐπωβελία). In case of mere failure to convict, i.e., to obtain one-half or more votes, he lost his deposit and fees. There is no indication that the litigant whose witness was convicted had to pay the ἐπωβελία.[2] In a *paragraphé*, whichever litigant lost his case forfeited the ἐπωβελία.[3] The purpose of this unique provision was at the same time to discourage the bringing of suits that could be thrown out on a technicality, and also the resort to a *paragraphé*. To balance this risk the litigant who entered a *paragraphé* had the advantage of speaking first. In a *diamartyria* in inheritance suits where the heir in possession produced a witness that the estate was not ἐπίδικος the claimant spoke first. In other cases of *diamartyria* if the plaintiff put forward a witness the defendant spoke first.[4]

In all cases of *paragraphé* in the orators the speaker invariably argues the whole case as if he were afraid to rest his case on the special plea. This situation is due in part to the Athenian judicial system where there was no separation of the law from the facts. The legal maxim *ad quaestionem juris non respondent juratores: ad quaestionem facti non respondent judices* did not hold in Athens where the dicasts were both

[1] Wyse, *op. cit.*, p. 374. Lipsius (*op. cit.*, p. 857) says it went to the winner of the case, but on p. 933 he leaves it uncertain.

[2] Lipsius, *op. cit.*, p. 858, n. 41.

[3] Isoc. xviii. 2–3.

[4] It is generally assumed that the litigant who first got the ear of the jury had an advantage. The oath of the dicasts to hear both sides impartially was intended to check the tendency of the dicasts to give more heed to the prosecutor or plaintiff; cf. Demos. xlv. 6: "He got the advantage of the opening speech, by reason of there having been a special plea [*paragraphé*] and the case not coming to trial upon the general issue; then, having read these pieces of evidence, and having made a variety of misrepresentations to suit his case, he made such an impression on the jury, that they would not hear me speak a single word." But some people are more impressed by the last speaker; cf. Aristoph. *Knights* 1118, πρὸς τόν τε λέγοντ' ἀεὶ κέχηνας, and *Wasps* 725, "'Twas a very acute and intelligent man, whoever it was, that happened to say, 'Don't make up your mind till you've heard both sides.' "

juratores and *judices*. In *Apollodorus* v. *Phormio*[1] the defendant pleads that the case is not ἀγώγιμος because Apollodorus had long ago given him a release and discharge of all and sundry claims. A bench of judges might, after examining the arbitration agreement and decision of the arbitrators, have dismissed the case without more ado. But in Athens the case had to come before a dicastery where a litigant found it difficult to confine himself to the special plea even if the grounds on which it was based could be easily separated from the issues of fact in the long and complicated relationship between Phormio and the family of Pasion. The author of the hypothesis observes this feature of the case: ἅπτεται μέντοι καὶ τῆς εὐθείας ὁ ῥήτωρ, δεικνὺς ὡς οὐκ εἶχεν ἡ τράπεζα χρήματα ἴδια τοῦ Πασίωνος. τοῦτο δὲ πεποίηκεν, ἵνα ἡ παραγραφὴ μᾶλλον ἰσχύῃ, τῆς εὐθείας δεικνυμένης τῷ Ἀπολλοδώρῳ σαθρᾶς. It is to be noted that Demosthenes, who composed the speech for Phormio, explains and virtually apologizes for the special plea: "We have put in the special plea to the action, not for the sake of evasion and delay, but in order that, if the defendant can show by the facts that he has committed no wrong, he may obtain in this court a final acquittal."[2] Not only this, but he adds an elaborate explanation and justification of the law upon which the *paragraphé* is based:

> You hear, men of Athens, the law mentioning among other matters for which there shall be no right of action those of which a man has given a release or discharge. And with reason, for if it is just that men shall not bring fresh actions for causes that have once been tried it is far juster that there shall be no action for claims which have been released. For a man who has lost his cause by your verdict may possibly say that you were deceived, but when a man has plainly decided against himself and given a release and discharge what complaint can he prefer against himself to entitle him to sue over again for the same matter? None surely. Therefore the framer of the statute among the cases in which there is to be no

[1] Demos. xxxvi.

[2] *Ibid.* 2. Under similar circumstances another client of Demosthenes anticipates possible objections as follows: "However, that none of you, men of Athens, may suppose that I have recourse to this plea [demurrer] because I have the worst of it on the merits of my case, I will proceed to show you that every particular of his charge against me is false" (xxxvii. 21).

right of action first mentions those in which a man has given a release and a discharge.[1]

In this case we happen to know the result. Apollodorus created such a bad impression on the jury that he failed to obtain one-fifth of the votes and forfeited the ἐπωβελία. This information we obtain from a suit for perjury launched by Apollodorus against Stephanus, a witness for Phormio.[2] It is impossible to determine whether the special pleas or the merits of the case weighed most with the jury, but it is evident there could have been little or no prejudice against a *paragraphé* when four-fifths of the dicasts voted for Phormio. Apollodorus himself seems to have thought that he lost the case because of the *paragraphé*, if we may trust a statement of his in the perjury case against Stephanus: "He got the advantage of the opening speech by reason of there having been a special plea and the case not coming to trial on the general issue."[3] Demosthenes, who wrote the speech, did not shirk the special plea.[4] Apollodorus himself, without censure or comment, recognizes the fact that dicasts expect the whole case to be discussed: "I think, men of Athens, you are all aware, that it is your practice to look at the facts of the case as much as at the pleas which are pleaded about them."[5]

There seems to have been a reluctance on the part of litigants and their advisers to rest a special plea upon the statute of limitations alone. In all extant cases where it is pleaded there is always another reason for a special plea. For example, in *Apollodorus* v. *Phormio* the defendant pleaded not only that the claim had been outlawed but that it had been settled by arbitration. It is perhaps significant that we have in this speech a most admirable exposition of the need of statutes of limitations.

[1] xxxvi. 25. [2] Demos. xlv. 6.

[3] *Ibid.;* there is implied criticism also in the words of Apollodorus in xlv. 76: "This really is the strangest thing. To this day he has never chosen to account to me for the money which he has defrauded me of, but pleads that my actions are not maintainable."

[4] The following sections deal with it: 14–16, 23–27, and 60. [5] *Ibid.* 51.

Now please take the statute of limitations. You are bound to pay attention to all laws, but especially to this, men of Athens. For Solon, as it seems to me, framed it for no other purpose but to prevent your being harassed with false claims. He considered that five years was a sufficient time for the injured parties to recover what was due them; and he thought that length of time would be the plainest proof against those who came with false stories. And knowing also that it was impossible for the contracting parties and their witnesses to live forever, he put the law in their place, that it might be witness of the truth in favor of the destitute.[1]

This statement puts the philosophy of a statute of limitations in a nutshell. In practice the statute of limitations is used in an attempt to throw suspicion upon an outlawed claim. Delay beyond the time limit fixed by law in seeking redress would seem to show lack of confidence in one's case.

Now take the law that enacts that guarantees shall be in force for a year. And I don't insist under the statute, that I ought not to pay damages if I became surety, but I say the statute is my witness that I never was surety, and so is the plaintiff himself; otherwise he would have sued me on the guarantee in the time specified by law.[2]

It may fairly be concluded that there was a natural prejudice against a litigant who sought shelter behind the statute of limitations to avoid paying what might very well be his just debts. It was good strategy to tack onto it some other ground for demurrer wherever possible.

A distinction between special pleas may be drawn on the ground that in some the verdict is final, in others it is interlocutory.[3] The verdicts are final with respect to the persons concerned in cases *περὶ ὧν μὴ εἶναι δίκας*. The speaker in the Nausimachus case[4] has a law read which he seems to think embraced all grounds for final verdicts: *ἀκούετε ὦ ἄνδρες δικασταὶ τοῦ νόμου σαφῶς λέγοντος ἕκαστα, ὧν μὴ εἶναι δίκας*. But this is clearly an overstatement. Calhoun has pointed out that "while a number of grounds for final decrees were, in the Demosthenic period, comprehended in this law, it is clear that others were distributed throughout a great many

[1] Demos. xxxvi. 26–27.

[2] *Ibid.* xxxiii. 27.

[3] Calhoun, *CP*, XIII, 174; Lipsius, *op. cit.*, pp. 847 ff.; Glotz, in Darem.-Saglio, *s.v.* "Paragraphé."

[4] Demos. xxxviii. 5.

enactments."[1] A good example of a final decree is the *Apollodorus* v. *Phormio* case already discussed. If Apollodorus had been successful in this suit for perjury, he could have collected damages, either the talent he asked for or the amount suggested by Stephanus in his *ἀντιτίμημα*. Furthermore, he could have sued Phormio on a charge of subornation of perjury (*δίκη κακοτεχνίων*) for substantial damages. But under no circumstances would his success in the suit against Stephanus have enabled him to reopen the original suit against Phormio.

The case against Zenothemis in which Demosthenes also wrote the speech furnishes an example of a case in which the verdict of the court is interlocutory.[2] Zenothemis had brought a commercial suit (*δίκη ἐμπορική*). This type of suit involved certain advantages. It was tried before the thesmothetai during the winter months when navigation was generally suspended. Each case had to be brought to trial within a month, and the loser might be held to bail for the amount of the judgment.[3] The conditions required for a suit of this kind are thus defined in the opening paragraph, where the ground for the *paragraphé* is explained:

> The laws, men of the jury, declare that actions between shipowners and merchants shall be upon loans to Athens or from Athens, and concerning which there are contracts in writing; and if anyone sues without being so entitled, his action shall not be maintainable.[4]

Now it is manifest that if the *paragraphé* is sustained by the verdict of the court it does not mean that the original plaintiff had no recourse. All he had to do was to bring his case in the proper category and before the proper court.

The prevailing view has been that a *paragraphé* never came before an arbitrator.[5] This extreme view has not gone un-

[1] For examples see Calhoun, *op. cit.*, pp. 174 f ; cf. Lipsius, *op. cit.*, p. 848.

[2] Demos. xxxii; cf. Calhoun, *op. cit.*, p. 174.

[3] Lipsius, *op. cit.*, pp. 85, 631.

[4] Demos. xxxii. 1.

[5] Cf. Lipsius, *op. cit.*, p. 229: "Eine Hinausschiebung der Entschiedung konnte durch Einreden [*παραγραφαί*] oder Fristgesuche [*ὑπωμοσίαι*] oder Einigung der Parteien über einen Aufschub [*ἀναβάλλεσθαι*] herbeigeführt werden." Cf. p. 835: "Ist eine Einrede gegen die Klage nicht erfolgt oder zurückgewiesen, so hat . . . . der

challenged.[1] Pollux, in discussing *μὴ οὖσα δίκη*,[2] associates *paragraphé* with arbitration:

> *ἡ δὲ μὴ οὖσα δίκη οὕτως ὠνομάζετο, ὁπόταν τις παρὰ διαιτηταῖς παραγραψάμενος, καὶ ὑπομοσάμενος νόσον, ἢ ἀποδημίαν, εἰς τὴν κυρίαν οὐκ ὀφθεὶς, ἢ μὴ ἀπαντήσας, ἐρήμην ὄφλῃ, ἐξὴν ἐντὸς δέκα ἡμερῶν τὴν μὴ οὖσαν ἀντιγράφειν.*

A note in the *Lexicon rhetoricum Cantabrigiense* also on *μὴ οὖσα δίκη* purports to quote a statement of Demetrius of Phalerum:

> *ἐνίους λέγει τῶν κρινομένων κακοτεχνεῖν τοῖς διώκουσιν ἀντιλαγχάνοντας τὴν μὴ οὖσαν. . . . . ἐνίους δὲ ἀσθενὲς τὸ δίκαιον ἔχοντας καὶ δεδοικότας τὴν καταδίαιταν χρόνους ἐμβάλλειν καὶ σκήψεις οἵας δοκεῖν εἶναι εὐλόγους, καὶ τὸ μὲν πρῶτον παραγράφεσθαι, εἶτα ὑπόμνυσθαι νόσον ἢ ἀποδημίαν, καὶ τελευτῶντας ἐπὶ τὴν κυρίαν τῆς διαίτης ἡμέραν οὐκ ἀπαντῶντας, ὅπως δύνωνται ἀντιλαγχάνειν, κ.τ.λ.*

In these sources, and also in a scholium on Demosthenes xxi. 84, *paragraphé* and *ὑπωμοσία* in arbitration are more or less closely associated. Their close association in several speeches in the Demosthenic corpus has also led Lipsius and others before him to assume that we have here a different kind of *paragraphé* from that introduced by Archinus for amnesty cases and later extended to the majority of civil suits.

This combination of *paragraphé* and *ὑπωμοσία* with arbitration appears in *Demosthenes* v. *Midias*.[3] The plaintiff tells of a *δίκη κακηγορίας* which at an earlier stage of their litigation he had lodged against Midias. The case went to a public arbitrator, who gave his decision against Midias in default. Midias moved to have the case reopened before the arbitrator but failed to take the necessary oath. In consequence the award of the arbitrator became absolute and final.[4] In his

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Gerichtsvorstand sie an einen öffentlichen Schiedsrichter zu verweisen." Cf. also Meier-Schömann-Lipsius, *op. cit.*, pp. 825 ff.

[1] Calhoun, *CP*, XIV, 20 ff.; Harrell, "Public Arbitration in Athenian Law," *University of Missouri Studies*, XI, No. 1, 31 f.

[2] viii. 60.

[3] Demos. xxi. 81, 83–86.

[4] *Ibid.* 86: *τὴν μὲν δίαιταν ἀντιλαχὼν οὐκ ὤμοσεν, ἀλλ' εἴασε καθ' ἑαυτοῦ κυρίαν γενέσθαι, καὶ ἀνώμοτος ἀπηνέχθη.* Cf. Kennedy, *Translation of Demosthenes*, III, 93, n. 5.

story of the arbitration Demosthenes shows that there was a παραγραφή connected with it: ἐπειδή ποθ' ἧκεν ἡ κυρία, πάντα δ'ἤδη διεξεληλύθει ταῦτα τἀκ τῶν νόμων, ὑπωμοσίαι καὶ παραγραφαί, καὶ οὐδὲν ἔτ' ἦν ὑπόλοιπον . . . . κατεδιήτησεν.[1]

In *Apollodorus* v. *Phormio* we have a *paragraphé* case that was sent to an arbitrator.[2] Phormio had pleaded that the case not only was outlawed but had been settled by the payment of a certain sum fixed by private arbitration. As far as we know the *paragraphé* could have been filed with the Forty and passed on to the arbitrator. Indeed this was the natural thing to be done because the grounds upon which the special plea was based could not be established without an investigation involving the submission of depositions to prove the discharge.[3] This task could have been performed by the arbitrator alone. On the other hand, Phormio may have joined issue without filing a *paragraphé* with the Forty. In the informal recurrent sessions before the arbitrator there could be little, if any, advantage in the privilege of speaking first. Besides, the evidence that the case had been settled by agreement could have been introduced into the arbitration proceedings without a previous *paragraphé*. The case proves that a *paragraphé* could be heard by an arbitrator, but it furnishes no evidence as to whether it was filed with the Forty or afterward before the arbitrator. But it does show that the view of Lipsius that *paragraphé* and arbitration were mutually exclusive is untenable.[4]

Another case in the Demosthenic corpus[5] in which *paragraphé* is associated with arbitration presents unusual difficulties. It is needless to go into the details of the series of troubles in which the speaker[6] was involved in trying to force

[1] xxi. 84.

[2] This is apparent from Demos. xlv. 57–58.

[3] *Ibid.* xxxvi. 16–17.

[4] Cf. Calhoun, *op. cit.* There was a *paragraphé* and arbitration also in *Against Nausimachus et al.*, but in view of the very slight reference to arbitration (Demos. xxxviii. 6), the case is of no value in this discussion.

[5] xlvii.

[6] It will be convenient to call the plaintiff in the present case the "speaker" in order to avoid confusion.

Theophemus to turn over the ships' gear which he still retained after the expiry of his trierarchy. The story is badly presented. At one stage of the case the speaker went to the home of Theophemus in an effort to obtain the ships' gear. Failing in this, he proceeded to make a seizure. A fight ensued in which each claimed that the other was the aggressor.[1] Sometime later the speaker filed a *δίκη αἰκίας* before the Forty, to which Theophemus responded with a cross-action (*ἀντιγραφή*). Each case was sent to a separate arbitrator.[2] Pollux says: *καὶ ἡ παραγραφὴ δὲ ἀντιγραφῇ ἔοικεν· διὸ καὶ προεισέρχεται.*[3] Schaefer,[4] without referring to Pollux, maintains that the cross-action was tried first. Schulze[5] thinks this true when both actions had to do with the same matter. Later scholars do not agree.[6]

Let us see how far Pollux is justified by the present case. Theophemus' case did come to trial first,[7] but it was due to the fact that when the arbitrator in the case of the speaker versus Theophemus was on the point of giving his decision the defendant entered a *paragraphé* and a *ὑπωμοσία*:

> *προσεκαλεσάμην αὐτὸν καὶ ἔλαχον αὐτῷ δίκην τῆς αἰκίας. ἀντιπροσκαλεσαμένου δὲ κἀκείνου ἐμὲ καὶ διαιτητῶν ἐχόντων τὰς δίκας, ἐπειδὴ ἡ ἀπόφασις ἦν τῆς δίκης, ὁ μὲν Θεόφημος παρεγράφετο καὶ ὑπώμνυτο, ἐγὼ δὲ πιστεύων ἐμαυτῷ μηδὲν ἀδικεῖν εἰσῄειν εἰς ὑμᾶς.*[8]

The effect of the *paragraphé* and *ὑπωμοσία* of Theophemus was to block the arbitration in the case of the speaker versus Theophemus. The speaker says that, having confidence that he had done no wrong, he came before the court. This can only mean that the arbitration, Theophemus versus the

[1] xlvii. 34 ff.

[2] *Ibid.* 45; cf. Schulze, *Prolegomenon in Demos. quae fertur orationem adv. Apaturium*, pp. 19 ff.

[3] viii. 58; *s.v. ἀντιγραφή.*

[4] *Demosthenes und seine Zeit* (1st ed.), III, 2, 196.

[5] *Op. cit.*, p. 16.

[6] Cf. Lipsius, *op. cit.*, p. 860.

[7] Demos. xlvii. 39: *ταύτῃ δὲ τῇ μαρτυρίᾳ πρότερος εἰσελθὼν εἰς τὸ δικαστήριον, οὐ παραγραφομένου ἐμοῦ οὐδ' ὑπομνυμένου διὰ τὸ καὶ πρότερόν ποτε ἐφ' ἑτέρας δίκης ταῦτά με βλάψαι, ἐξηπάτησε τοὺς δικαστάς.*

[8] *Ibid.* 45.

speaker, continued to its end and that the speaker was determined to appeal the arbitrator's decision in case the award was against him. This was precisely what happened.[1]

When we come to the nature of the *paragraphé* and ὑπωμοσία of Theophemus, we find no agreement among those who have cared to raise the question. If Pollux is right, it might be that Theophemus asked for an adjournment to enable him to bring proof that he had in fact filed a cross-action. The speaker implies that although he did not himself in fact resort to a *paragraphé* and ὑπωμοσία, he might have done so. This means that either in the arbitration in which he was defendant the speaker might have tried to use a *paragraphé* and ὑπωμοσία[2] or in the arbitration in which he was plaintiff the speaker might have tried to block the defendant's maneuver by a counter-*paragraphé* and ὑπωμοσία.[3] However, there would still be a difficulty concerning the nature of the *paragraphé*.

In Demosthenes' summary of the proceedings before the arbitrator in his δίκη κακηγορίας against Midias[4] he speaks of *paragraphai* which the arbitrator dismissed. There are two possible explanations of the plural. Either Midias offered more than one *paragraphé* or Demosthenes, the plaintiff, met the defendant's *paragraphé* with a counter-*paragraphé*.[5] Either alternative excludes the normal *paragraphé*. For in the extant λόγοι παραγραφικοί there may be several grounds for a *paragraphé* but only one *paragraphé*, and it is always filed by the defendant. Under these circumstances it looks as if we

[1] If Theophemus had lost and appealed, the speaker would surely have mentioned it. The fact that the speaker lost is the reason for his obscure phraseology.

[2] It is a fruitless task to speculate just how two arbitrators dealing with the same facts could avoid being hopelessly at cross-purposes if they accepted contrary *paragraphai*. The purpose of a *paragraphé* and ὑπωμοσία in Theophemus versus the speaker would be to create such a situation.

[3] There could be no *paragraphé* in the perjury case which he is arguing; nor could he say εἰς ὑμᾶς εἰσῄειν of his δίκη αἰκίας against Theophemus which was still pending (xlvii. 8, 10; cf. Lipsius, *op. cit.*, p. 862; Hubert, *De arbitris Atticis*, p. 40).

[4] xxi. 84.

[5] The suggestion that we have here a rhetorical plural can hardly be entertained; cf. Calhoun, *op. cit.*, p. 25.

have here and also in the Theophemus case, since the linking of *paragraphé* and ὑπωμοσία proves that they refer to the same procedure, an entirely different kind of *paragraphé*.

Harpocration begins his definition of *paragraphé* with the words οὐ μόνον ἐπὶ τοῦ κοινοῦ καὶ γνωρίμου τίθεται παρὰ τοῖς ῥήτορσιν, which seems to indicate that the word had only one technical significance.[1] This is not such a formidable objection as it might at first sight seem to be. *Paragraphé* may be used in its etymological meaning of "notation on a document." Whatever the procedure was, it must have been available for both parties. If either party wanted an adjournment for any purpose on the eve of the arbitrator's award, how did he proceed to obtain it? Evidently an oath was required if the opponent raised an objection. It has been observed that this type of oath is always associated with a μὴ οὖσα δίκη. There must have been some record of such requests. The simplest explanation of all the phenomena involved is to regard the *paragraphé* as the record of the reasons for the adjournment noted on the pleadings of the party who made the request. As evidence of good faith in the face of opposition an oath was required. The confusion of *paragraphé* and μὴ οὖσα δίκη in the lexicographers which Calhoun has observed may be due to the fact that a belated *paragraphé* and ὑπωμοσία were not infrequently resorted to in order to have ground for having a decision *in contumaciam* set aside later.[2]

[1] *S.v.* παραγραφή; cf. Suidas, *s.v.*; Calhoun, *op. cit.*, p. 24, n. 1. The rest of the definition has nothing to do with legal technicalities.

[2] Harrell, *op. cit.*, p. 30.

CHAPTER V

ARBITRATION

The prevailing view is that practically all private suits were subject to arbitration.[1] The question has been raised, however, as to whether arbitration was not confined to cases within the jurisdiction of the Forty and similar cases within the jurisdiction of the polemarch, and that hence no private suits within the jurisdiction of the archon and the thesmothetai were subject to arbitration.[2] According to this theory, certain cases commonly assigned to these magistrates must lie within the jurisdiction of the Forty. Some scholars have accepted this view, but Lipsius[3] rejects it and Busolt and Swoboda[4] follow him.

In connection with the statement that all cases which came before the Forty involving more than ten drachmas were subject to arbitration, Aristotle reminds his readers of the development of the Forty from the thirty rural justices who were instituted by Peisistratus as arbitrators and justices.[5] In his account of the other boards and magistrates Aristotle says nothing about arbitrators except in connection with the polemarch, who accepted for non-citizens the same cases as the Forty did for the citizens. Consequently provision was made for participation of non-citizens in the benefits of arbitration by turning over to the Forty directly their cases which were subject to arbitration:

> It is his [the polemarch's] duty to receive these cases and divide them into ten parts, and assign to each tribe the part which comes to it by lot;

[1] Cf. Meier-Schömann-Lipsius, *Der Attische Process*, pp. 1009 ff.; Lipsius, *Berichte der Königlich Sächsischen Gesellschaft der Wissenschaften* (Philol.-Hist. Classe), XLIII (1891), 58. Lipsius (*Das Attische Recht*, p. 82, n. 116; cf. p. 228) excepts suits before the ἀποδέκται and the εἰσαγωγεῖς.

[2] Bonner, "The Jurisdiction of Athenian Arbitrators," *CP*, II, 407 ff.

[3] *Op. cit.*, p. 533, n. 61.

[4] *Griechische Staatskunde*, p. 1111.

[5] *Ath. Pol.* liii. 2; cf. *supra*, I, 184–85.

after which the magistrates who introduce the cases for the tribe hand them over to the Arbitrators.[1]

Aristotle mentions arbitrators in connection with no other judicial officials or boards. His silence is not proof that *dikai* filed before other magistrates were not subject to arbitration but it is highly significant. In describing the jurisdiction of the polemarch Aristotle says that there were some *dikai* which were not subject to arbitration. These the polemarch himself introduced into court (*αὐτὸς δ' εἰσάγει*). Among them were suits dealing with estates and heiresses. It may fairly be concluded that these suits were not subject to arbitration when they concerned citizens and came before the archon.

The language of Aristotle describing the judicial functions of the archon definitely excludes the intervention of arbitrators in his cases: *γραφαὶ δὲ καὶ δίκαι λαγχάνονται πρὸς αὐτόν, ἃς ἀνακρίνας εἰς τὸ δικαστήριον εἰσάγει.*[2] Pischinger,[3] who believes that the archon and all other magistrates sent their cases through the Forty to the arbitrators, observes the difficulty and seeks to escape it by complaining of the carelessness of Aristotle in not mentioning the important process of arbitration which, according to his theory, intervened between entering a suit and the trial. But his explanation that *ἀνακρίνας* refers only to *graphai* assumes on the part of Aristotle even greater carelessness in expressing himself, and serves only to emphasize Pischinger's appreciation of a difficulty that called for such heroic treatment.[4] Such an unnatural, not to say impossible, interpretation of Aristotle's words is of no avail, for a client of Demosthenes, in an inheritance case, passes immediately from the *anakrisis* of the archon to the trial using exactly the same words as Aristotle: *καὶ μετὰ ταῦθ' ὁ ἄρχων ἀνέκρινε πᾶσιν ἡμῖν τοῖς ἀμφισβητοῦσι, καὶ ἀνακρίνας εἰσήγαγεν εἰς τὸ δικαστήριον.*[5]

Hubert[6] long ago observed that in none of the so-called

[1] *Ibid.* lviii. 2 (trans. Kenyon).

[2] *Ibid.* lvi. 6.

[3] *De arbitris Atheniensium publicis*, p. 39.

[4] *Ibid.*, p. 34, n. 3: "Hanc totam materiam Aristoteles minore cura aut scientia tractavit."

[5] xlviii. 31; cf. xliii. 7–8.

[6] *De arbitris Atticis et privatis et publicis*, p. 38.

inheritance cases, which are comparatively numerous in the orators, is there any mention of arbitration except in an affidavit in *Eubulides* v. *Macartatus*. The facts are briefly as follows. The estate of one Hagnias was claimed by a young man to whose mother Phylomache the estate had been adjudged in earlier litigation. In subsequent litigation the case was reopened and the estate was awarded to Theopompus, but when he died before the expiration of the *προθεσμία* of five years the estate was claimed by Eubulides, the minor son of Phylomache, who was now deceased. Macartatus, the son of Theopompus, was in possession. In a rather detailed account of the preceding litigation Sosicles, who is conducting the case for his son, calls for evidence that Phylomache won the first case: *ὡς ἐνίκησε τοῦ κλήρου τοῦ Ἀγνίου ἡ Εὐβουλίδου θυγάτηρ Φυλομάχη.*[1] But the affidavit we find inserted at this point merely proves that the decision of the arbitrator was in her favor: *μαρτυροῦσι παρεῖναι πρὸς τῷ διαιτητῇ ἐπὶ Νικοφήμου ἄρχοντος, ὅτε ἐνίκησε Φυλομάχη ἡ Εὐβουλίδου θυγάτηρ τοῦ κλήρου τοῦ Ἀγνίου τοὺς ἀμφισβητοῦντας αὐτῇ πάντας.* Naturally, an arbitrator's decision, if it was accepted as a final settlement of the case, would be evidence that Phylomache won her case.[2] But she did not win by an arbitrator's decision, for there is in the speech itself the statement of Sosicles to the effect that the estate was awarded to his wife by a dicastic court. In referring to the second case, which Phylomache lost, he speaks of her opponents who co-operated and took measures in common *ὅπως ἀφέλωνται τὴν γυναῖκα τὴν τουτουὶ μητέρα τοῦ παιδὸς τὸν κλῆρον, ὃν αὐτῇ ὑμεῖς ἐψηφίσασθε.*[3] No one who had just said that a case was settled by the verdict of a dicastic court would produce in proof of his statement the verdict of a public arbitrator. Blass suggests the substitution of *δικαστηρίῳ* for *διαιτητῇ*.[4] It is submitted that a piece of

[1] Demos. xliii. 31.

[2] It is idle to attempt to escape the difficulty by arguing that since Phylomache's victory was not in dispute this affidavit served the purpose well enough; cf. Drerup, *Jahrb. f. class. Phil.*, XXIV, 325.

[3] Demos. xliii. 30.

[4] Edition of Demos., *Commentarius criticus*, *ad loc.* Lipsius (*op. cit.*, p. 982) regards the affidavit as *unecht*.

documentary evidence, which has generally been viewed with suspicion because it does not confirm any statement of the speaker, should not be cited as the sole proof that inheritance cases were subject to arbitration, especially in the face of strong evidence to the contrary.

In several other cases connected with inheritance it is clearly implied that evidence might be produced that was not included in the docket.

> Let Androcles, therefore, prove that the children are legitimate. . . . . His mere mention of his mother's name does not suffice to make them legitimate, but he must prove that he is speaking the truth by producing the relatives [as witnesses] who know. . . . .[1]
>
> To prove what I say is true, his victims, though they are afraid, yet may perhaps be willing to support me by their evidence; otherwise, I will produce as witnesses those who know the facts.[2]

In another case the speaker, unable to find anyone to give positive evidence, calls an unwilling or hostile witness either to give evidence or to take an oath in disclaimer.[3] Still another speaker contemplates the possibility of the introduction of evidence by his opponent of which he has no certain knowledge: *ὥστε ἂν ἐπὶ τοῦτον τὸν λόγον καταφεύγῃ καὶ μάρτυρας παρέχηται ὡς διέθετο ἐκεῖνος.*[4] The fact that in these passages new evidence is contemplated shows inevitably that these were not arbitration cases, because in a hearing before an arbitrator all the evidence had to be presented.[5]

In the text of *Das Attische Recht*, Lipsius regards the inheritance cases and all other *dikai* that came before the archon as subject to arbitration.[6] In the *Nachträge und Berichtigung* at the end of his work, however, Lipsius retracts his

[1] Isaeus vi. 64.

[2] *Ibid.* viii. 42.

[3] *Ibid.* ix. 18: *ἵνα ἐναντίον τούτων μαρτυρήσῃ ἢ ἐξομόσηται.*

[4] *Ibid.* x. 23; cf. ix. 9.

[5] For a full discussion of the *anakrisis* cf. *supra*, I, 283 ff.; Leisi, *Der Zeuge*, p. 83; Thalheim, *Berl. Phil. Woch.*, XXIV, 1574–76.

[6] P. 228, n. 31; cf. p. 839, n. 35, where he rejects the use of expressions of a speaker indicating uncertainty as to what evidence his opponent will produce to determine whether a case came before an arbitrator or not. All such language he regarded as *hypothetische Fassung*, or, as Gomme puts it ("Two Problems of Athenian Citizenship Law," *CP*, XXIX, 128), "a rhetorical device."

earlier view and admits that inheritance cases were not subject to arbitration.[1]

If we accept the final view of Lipsius that all *dikai* except the *ἔμμηνοι δίκαι*[2] and the *διαδικασίαι κλήρων* were subject to arbitration,[3] what was the relationship of the other magistrates and boards to the arbitrators? Pischinger[4] believes that, like the cases of the polemarch, all cases must go to the arbitrators through the Forty. Suits originating with the archon or the thesmothetai would then have to go through an intolerably cumbersome procedure. This in itself is enough to arouse suspicion. According to this theory, for example, a case is entered before the archon; he holds an *anakrisis* and sends it to the Forty. From them it goes to the proper arbitrator. But this is not in accordance with the statement of Aristotle, who distinctly says that the archon brought his own cases into court, without any mention of an intervening arbitration.[5] Furthermore, in case of an appeal from an arbitrator's award, according to Pischinger, the case went back to the original magistrate—for example, to the Forty or to the archon. But this again is not in accordance with Aristotle, who says appeals went to the Forty who took them into court: *παραδιδόασι* (*οἱ διαιτηταί* in case of appeal) *τοῖς τέτταρσι τοῖς τὴν φυλὴν τοῦ φεύγοντος δικάζουσιν. οἱ δὲ παραλαβόντες εἰσάγουσιν εἰς τὸ δικαστήριον.*[6] To reconcile both these statements of Aristotle, Pischinger resorts to the doubtful expedient of denying the accuracy of Aristotle. Relying on Harpocration,[7] he holds that all cases which came to the arbitrators were referred back on appeal to the magistrates who first received them. But the words *καὶ σημηνάμενοι* (*sc. οἱ διαιτηταί*) *παρεδίδοσαν τοῖς εἰσαγωγεῦσι τῶν δικῶν* are too indefinite to support an impeachment of the testimony of Aristotle; *τοῖς εἰσαγωγεῦσι* may refer to the Forty as well as

[1] *Op. cit.*, p. 981.

[2] These were filed before the *ἀποδέκται* and the *εἰσαγωγεῖς*; cf. *ibid.*, p. 82.

[3] Naturally the *δίκαι φόνου* could not very well be subject to public arbitration.

[4] *Op. cit.*, p. 39.

[5] *Ath. Pol.* lvi. 6.

[6] *Ibid.* liii. 2–3.

[7] *S.v. διαιτηταί.*

to the original magistrates in the various cases. But, apart from this, Harpocration is as usual following Aristotle and is evidently of the opinion that he is simply reporting, not correcting him, for he adds: *λέγει δὲ περὶ αὐτῶν* (*sc. τῶν διαιτητῶν*) *Ἀριστοτέλης ἐν Ἀθηναίων πολιτείᾳ.* Lipsius[1] disagrees with Pischinger's theory that all cases went to an arbitrator through the Forty, but agrees with Pischinger in saying that cases, on appeal from an arbitrator's award, were returned to the magistrates with whom they originated. This explanation, however, fails to explain why Aristotle is silent about arbitration in the case of the archon and the thesmothetai but mentions it in the discussion of the polemarch. All difficulties disappear if one accepts just what Aristotle's words imply, that only the cases of the Forty and those of the polemarch with the exception of inheritance cases were subject to arbitration.[2]

To scholars not prejudiced by reading the extant speeches the arguments drawn from Aristotle would be convincing. "Non enim pagorum judices soli," says Pischinger, "sed etiam alii magistratus arbitris causas instruendas tradebant, id quod ex orationibus Demosthenis satis intellegitur."[3] Pischinger gives a list of cases from the orators in which public arbitration appears, assigning the cases to the magistrate he thinks proper, as follows:

I. Archontis actiones
   (1) *ἐπιτροπῆς*: Lysias xxxii; Demos. xxvii; xxix
   (2) *κλήρου*: Demos. xliii. 31
   (3) Status familiae: Demos. xl. 10

II. Thesmothetarum actiones
   (1) *κλοπῆς*: Demos. xxii. 27–28
   (2) Status civitatis: Lysias xxiii; Isaeus xii; Demos. lix. 60[4]

The inheritance case (*κλήρου*) is no longer regarded as subject to arbitration and may be omitted at once.[5] The next most important case assigned to the archon is the so-called guardianship case (*δίκη ἐπιτροπῆς*). Lipsius[6] maintains that guard-

[1] *Op. cit.*, p. 227, n. 30.
[2] *Ath. Pol.* lviii.
[3] *Op. cit.*, p. 34.
[4] *Ibid.*, p. 35.
[5] Cf. *supra*, pp. 98 ff.
[6] *Op. cit.*, p. 533, n. 61.

ianship cases came before the archon and rejects the arguments to the contrary.[1] It is to be noted that Aristotle makes no mention of guardianship suits in the list of cases he gives for the archon, but, as Lipsius justly points out, it cannot be assumed that Aristotle's list is exhaustive. But an examination of the list reveals the fact that the archon's cases are limited to suits involving the disposition of the estate (*κλήρων καὶ ἐπικλήρων ἐπιδικασία*), division of an estate (*δατητῶν αἵρεσις*), abuse of an estate (*γραφὴ παρανοίας, οἴκου ὀρφανικοῦ κάκωσις*), abuse of members of the family (*γονέων κάκωσις, ἐπικλήρου κάκωσις, ὀρφανῶν κάκωσις*), rival claims to guardianship (*ἐπιτροπῆς διαδικασία*). And in general the archon

> has the care of orphans and heiresses and widows who on the death of their husbands declare that they are with child. . . . . He also leases out the houses of orphans and heiresses until they reach the age of fourteen and takes security for the property leased; and if the guardians fail to support his wards the archon collects the necessary funds from the guardians.[2]

The means at his disposal for carrying out these duties are a limited fine, and prosecution if he thinks a fine beyond his competence is warranted: *κύριός ἐστι τοῖς ἀδικοῦσιν ἐπιβάλλειν ἢ εἰσάγειν εἰς τὸ δικαστήριον.*[3]

It is to be observed that the archon's care of and responsibility for orphans ceases after their majority, and that his relations with guardians continue only during the minority of the ward. In the actions against guardians during the ward's minority he presides. As described by Aristotle, the archon's relationship to guardians is as follows. Under certain circumstances he appointed them. He decided between rival claimants for guardianship. Where injuries were done to the persons or property of wards he presided in the court which tried the case. Where a guardian refused to support his ward or to rent the real estate the archon was empowered to take action. It is of immediate interest to note that all these contacts between archon and guardian cease with the major-

[1] Bonner, *CP*, II, 413 ff.

[2] Arist. *Ath. Pol.* lvi. 6–7.

[3] *Ibid.*; cf. *supra*, I, 279 ff.; Demos. xliii. 75.

ity of the ward. While it may be freely admitted that there may have been other contacts, it is submitted that they do not go beyond the minority stage, even to the extent of presiding in court for a trial of a *δίκη ἐπιτροπῆς* brought by a ward on attaining manhood against a guardian for false accounting or for failure to hand in an account. Lipsius and his followers have unhesitatingly ascribed this type of suit to the archon rather than to the Forty where it naturally belongs.

In nearly all the inheritance cases in the orators the archon is mentioned as the presiding officer. In *Eubulides* v. *Macartatus*[1] the speaker in referring to an earlier suit involving the estate in litigation says *ἐπειδὴ ἦγεν ὁ ἄρχων εἰς τὸ δικαστήριον*, and again he says of the suit in hand that it was filed before the archon: *ὁ παῖς οὑτοσὶ προσεκαλέσατο Μακάρτατον τοῦ κλήρου τοῦ Ἀγνίου εἰς διαδικασίαν, καὶ ἔλαχε πρὸς τὸν ἄρχοντα, κύριον ἐπιγραψάμενος τὸν ἀδελφὸν τὸν ἑαυτοῦ.*[2] In still another case which is not an inheritance case but grew out of one the speaker in sketching the inheritance case explicitly mentions the archon as the presiding officer: *ἐπειδὴ ἀνεκρίθησαν πρὸς τῷ ἄρχοντι ἅπασαι αἱ ἀμφισβητήσεις.*[3] There are also several similar references in Isaeus.[4]

In contrast with this situation in inheritance cases where the archon is mentioned as the presiding officer in the bulk of the cases referred to in the orators,[5] the archon is not once referred to as the presiding officer in the eight speeches in guardianship suits. This cannot be a matter of chance or accident. It is highly significant.

In one case, *Demosthenes* v. *Onetor*, there is a reference to the archon. The passage is as follows:

[1] Demos. xliii. 8.

[2] *Ibid.* 15; cf. xliv. 1: *ἀξιῶν κληρονομεῖν ὧν οὐ προσῆκεν αὐτῷ, καὶ ὑπὲρ τούτων ψευδῆ διαμαρτυρίαν πρὸς τῷ ἄρχοντι ποιησάμενος.*

[3] *Ibid.* xlviii. 23.

[4] v. 18: *συγχωρούντων γὰρ ἡμῶν τῷ ἄρχοντι μὴ συναριθμεῖν ἀλλὰ συγχέαι τὰς ψήφους*; cf. vi. 12: *ὅτε γὰρ αἱ ἀνακρίσεις ἦσαν πρὸς τῷ ἄρχοντι*; xi. 33: *εἰ μὲν κατ' ἀγχιστείαν τῶν Ἀγνίου μετεῖναί φησι τῷ παιδὶ τοῦ ἡμικληρίου, λαχέτω πρὸς τὸν ἄρχοντα.*

[5] For the list see Schulthess, *Vormundschaft nach Attischem Recht*, pp. 242 ff. It is difficult to compute the exact number of cases classified as *δίκαι κλήρου* which are argued or referred to in more or less detail.

It was known, men of the jury, to many of the Athenians, and it did not escape the observation of the defendant, that my guardians were grossly neglecting their duty. The discovery was indeed made very early; numerous meetings and discussions were held on the subject of my affairs, before the archon as well as other persons [*τοσαῦται πραγματεῖαι καὶ λόγοι καὶ παρὰ τῷ ἄρχοντι καὶ παρὰ τοῖς ἄλλοις ἐγίγνοντο ὑπὲρ τῶν ἐμῶν*]. For the value of the property left me was notorious, and it was pretty evident, that the trustees were leaving it unlet, for the purpose of enjoying the income themselves. This being so, there was not a single man acquainted with the circumstances, who did not expect that I should recover compensation from them, as soon as I came of man's estate.[1]

Here Demosthenes, trying to realize on the verdict of the court in his favor for ten talents in *Demosthenes* v. *Aphobus*, sues Onetor, the brother-in-law, to obtain a piece of property of which Onetor is the "mortgagee" on the ground of collusion between Aphobus and Onetor. Demosthenes is trying to prove to the jury that under the circumstances Onetor could not plead that he was an innocent "mortgagee" of the property because he could not fail to have been aware of the defalcations and embezzlement of his guardians, which were so well known to everybody that it was generally expected he would win his case. In that event the whole property of Aphobus would be liable to execution to satisfy the judgment. But no one regards the reference to the archon in *Demosthenes* v. *Onetor*[2] as any indication that the archon presided at a *δίκη ἐπιτροπῆς*,[3] because, whatever activities and discussions may have taken place before the archon, they happened during the minority of Demosthenes.

There is a case in Demosthenes which throws some light on the *δίκη ἐπιτροπῆς*. The situation is not easy to discover. Perhaps something like this happened. Nausimachus and Xenopithes sued their guardian, Aristaechmus, in connection with the account of the estate, *ὡς γὰρ οὐκ ἀποδόντι λόγον, καὶ τοῦτο ἐγκαλοῦντες φαίνονται. λέγε αὐτὸ τὸ ἔγκλημα, ὃ τότ' ἔλαχον τῷ πατρί.*[4] It seems that he settled their claims by paying three

[1] Demos. xxx. 6 (trans. Kennedy).

[2] *Ibid.*, just cited.

[3] Cf. Beauchet, *Histoire du droit*, II, 273; Dareste, *Les Plaidoyers civils de Demosthène*, I, 85; Schaefer, *Demosthenes und seine Zeit*, I, 270.

[4] xxxviii. 15.

talents and turned over an estate consisting of houses and lands and a debt of one hundred staters owed the estate by one Hermonax of Bosporus. It is not clear whether they accepted the assignment of the debt as a settlement or whether it was to be collected for them by their former guardian. At any rate, the plaintiffs Nausimachus and Xenopithes sued the heirs of Aristaechmus on the ground that he himself or someone in his behalf had collected the money: *οὗτοι γὰρ γεγράφασιν εἰς ὃ νῦν ἔγκλημα διώκουσιν, ὀφείλειν ἡμᾶς τὸ ἀργύριον κομισαμένου τοῦ πατρὸς καὶ παραδόντος αὐτοῖς τοῦτο τὸ χρέως ἐν τῷ λόγῳ τῆς ἐπιτροπῆς ὀφειλόμενον.*[1] The defendants demurred and entered a *paragraphé* that the case was not actionable because there had been a release and further because the statute of limitations had run its course of five years. The suit against the guardian was settled eight years after the wards reached their majority. The present suit was instituted twelve years later. The guardian Aristaechmus had died a few months after the settlement. There are some curious and interesting features about this case. It is an action for damages (*δίκη βλάβης*) and yet the defendants plead the statute of limitations in bar of action on the part of wards against their guardians: *βούλομαι καὶ ὑμῖν τὸν νόμον εἰπεῖν, ὅστις διαῤῥήδην λέγει, ἐὰν πέντε ἔτη παρέλθῃ καὶ μὴ δικάσωνται, μηκέτ' εἶναι τοῖς ὀρφανοῖς δίκην περὶ τῶν ἐκ τῆς ἐπιτροπῆς ἐγκλημάτων.*[2] These words undoubtedly refer to a *δίκη ἐπιτροπῆς*. They also plead a release. In an *ex parte* statement like this it is impossible to determine whether the guardian and his estate were still liable after the alleged settlement for three talents. It is true that the case was accepted by the Forty, but against the protests of the defendants. If the plaintiffs were right in their contention, the estate of a guardian could be sued on a claim on which he himself could not be brought into court. This is manifestly absurd. Beauchet[3] and others regard the *δίκη ἐπιτροπῆς* as a particular form of the *δίκη βλάβης*. If that be so, this case with all its obscurities goes far to show that the *δίκη ἐπιτροπῆς*, just as a *δίκη βλάβης*,

[1] *Ibid.* 14. [2] *Ibid.* 17. [3] *Op. cit.*, II, 303, n. 5.

came within the jurisdiction of the Forty. Lipsius[1] believes that a δίκη ἐπιτροπῆς could not be a *Schadenklage*, though he points out that a δίκη βλάβης could be used to collect a debt, and in a δίκη ἐπιτροπῆς the guardian is treated as a debtor rather than as a criminal embezzler.

In the Diogeiton case in Lysias[2] and in Demosthenes' own case against his guardians which are included in the list given by Pischinger there is no mention of the archon, though arbitration is mentioned. In brief, then, there is no evidence in the sources that guardianship cases (δίκαι ἐπιτροπῆς) came within the jurisdiction of the archon aside from such inference as may be drawn from the fact that the archon had charge of orphans and their interests during their minority. But a δίκη ἐπιτροπῆς could not be instituted by minors.[3]

The next arbitration case listed by Pischinger is labeled *status familiae*. The only extant case is *Boeotus and Pamphilus* v. *Mantias* mentioned in *Mantitheus* v. *Boeotus*.[4] The facts as given by a hostile speaker are briefly as follows. Boeotus and his brother Pamphilus grew to manhood as sons of Plangon, daughter of Pamphilus, who, so it was alleged, was the divorced wife of Mantias. These two young men on reaching manhood brought suit against their father to force him to recognize them as his sons. Sandys and Paley[5] have doubts as to the majority of Boeotus at this time. But the word αὐξηθείς and the fact that the men associated with him in laying a trap were not κύριοι but sycophants show clearly that he was no longer a minor. This case raises a number of problems that need not be discussed here.[6] Mantias was unwilling to be involved in litigation for various reasons and readily fell in with a scheme that he should tender an oath to

[1] *Op. cit.*, p. 657. [2] xxxii.

[3] At the risk of seeming κύνα δέρειν δεδαρμένην one may add another indication that there was no relationship between the arbitrators and the archon. A scholiast on Demos. xxi. 84, in speaking of arbitration, says: πολλάκις γὰρ οἱ ἀντίδικοι παρεγράφοντο. οὐ πρὸς διαιτητήν με κρίνεσθαι δεῖ, ἀλλὰ πρὸς ἄρχοντα, ἢ θεσμοθέτην. This shows clearly that in the opinion of the scholiast the same case did not come before the archon and the arbitrator.

[4] Demos. xl. 9 ff. [5] *Demosthenes' Select Private Orations*, I, 152.

[6] Cf. Lipsius, *op. cit.*, p. 505, n. 25, for the questions at issue.

Plangon to the effect that these young men were his sons.[1] It was understood by Mantias, however, that Plangon for the sum of thirty minas would refuse to take the oath before the arbitrator.[2] If she had refused to take the oath, as she had agreed to do, Mantias would have been free of all liability: *τούτων δὲ πραχθέντων οὐδὲν ἔτι ἔσεσθαι αὐτοῖς*.[3] Plangon, however, accepted the oath and declared that the young men were the sons of Mantias. Mantias, therefore, lost the case and introduced the plaintiffs into his phratry as his sons. The case came before an arbitrator, but there is no definite evidence to show which magistrate accepted the case. It has been generally assumed that as family relations were involved it naturally came before the archon. Lipsius does not expressly list it among the *Privatklagen* of the archon, but he approves of the list of arbitration cases given by Pischinger and their assignment to magistrates.[4] But no one gives a name to the suit.

There is, however, a piece of evidence which should be considered in this connection. Boeotus *ἐδικάζεθ' υἱὸς εἶναι φάσκων ἐκ τῆς Παμφίλου θυγατρὸς καὶ δεινὰ πάσχειν καὶ τῆς πατρίδος ἀποστερεῖσθαι*.[5] The words *δεινὰ πάσχειν* are the equivalent of *ἕτερα πολλὰ βλάπτεσθαι* used of a *δίκη βλάβης*.[6] Moreover, when Mantitheus, the son of Mantias, sued the tardily recognized Boeotus because he insisted on calling himself Mantitheus, the suit was a *δίκη βλάβης*.[7] There is practically no difference between the suits. One has to do with paternity, the other with a family name. They both concern family relations. If *Mantitheus* v. *Boeotus* is a *δίκη βλάβης*, so also is *Boeotus and Pamphilus* v. *Mantias*.[8] As such it came before the Forty and was subject to arbitration. This

[1] Demos. xl. 10.

[2] Cf. Isaeus xii. 9 for the willingness of Euphiletus' mother to take an evidentiary oath regarding his paternity.

[3] Demos. xxxix. 3. [4] *Op. cit.*, p. 228, n. 31. [5] Demos. xxxix. 2.

[6] *Ibid.* xli. 12: cf. xxxvi. 20 for a statement of claim in a *δίκη βλάβης*: *ἔβλαψέ με ὁ δεῖνα οὐκ ἀποδιδοὺς ἐμοὶ τὸ ἀργύριον, ὃ κατέλειπεν ὁ πατὴρ ὀφείλοντα αὐτὸν ἐν τοῖς γράμμασιν*. Cf. Lipsius, *op. cit.*, p. 653, n. 61.

[7] Lipsius, *op. cit.*, p. 652. [8] Demos. xxxix. 2.

disposes of Pischinger's list of arbitration cases which he assigned to the jurisdiction of the archon.

Two types of cases subject to arbitration are assigned to the thesmothetai. One is the *δίκη κλοπῆς*. In *Euctemon and Diodorus* v. *Androtion*[1] one of the plaintiffs, in discussing the various means of redress open to aggrieved persons, mentions larceny as a crime that may be dealt with in four distinct ways. One of these was a civil action (*δίκη κλοπῆς*) subject to arbitration. The phraseology is suggestive: "Sue him for theft before an arbitrator [*δικάζου κλοπῆς πρὸς διαιτητήν*]." No mention is made in the sources of the presidency of the court which would try civil suits for larceny. The authors of *Der Attische Process* say[2] that probably (*wahrscheinlich*) the case came before the thesmothetai. In Aristotle's account of the judicial functions of the thesmothetai several *dikai* are mentioned without the slightest hint that there are others: *εἰσάγουσι δὲ καὶ δίκας ἰδίας, ἐμπορικὰς καὶ μεταλλικὰς καὶ δούλων, ἄν τις τὸν ἐλεύθερον κακῶς λέγῃ. . . . . καὶ τὰς δίκας τὰς ἀπὸ τῶν συμβόλων εἰσάγουσι.*[3] There is nothing here to suggest a *δίκη κλοπῆς*.

Elsewhere, in discussing the functions of the *euthynoi* who for three days accepted charges and claims against former magistrates after their accounts had been passed, Aristotle says:

> And if anyone wishes to prefer a charge, on either public or private grounds, against any magistrate who has passed his audit before the lawcourts, within three days of his having so passed, he enters on a whitened tablet his own name and that of the magistrate prosecuted, together with the malpractice that is alleged against him. He also appends his claim for a penalty of such amount as seems to him fitting, and gives in the record to the Examiner. The latter takes it and hears the charge, and if he considers it proved he hands it over, if a private case, to the local justices who introduce cases for the tribe concerned, while if a public case he enters it on the register of the thesmothetai. Then if the thesmothetai accept it, they bring the accounts of this magistrate once more before the lawcourt, and the decision of the jury stands as the final judgment.[4]

[1] *Ibid.* xxii. 27–28.

[2] Meier-Schömann-Lipsius, *op. cit.*, p. 453.

[3] *Ath. Pol.* lix. 5–6.

[4] *Ibid.* xlviii. 4–5 (trans. Kenyon).

It thus appears that the bulk of the *graphai* went to the thesmothetai and the bulk of the *dikai* to the Forty. Or one might even conclude that all *dikai* not otherwise assigned went to the Forty. This view is supported by another statement in Aristotle. After discussing the cases that came within the jurisdiction of the Eleven, the εἰσαγωγεῖς, and the ἀποδέκται, he continues with a description of the duties of the Forty; πρὸς οὓς τὰς ἄλλας δίκας λαγχάνουσιν.[1] This body decided all cases under ten drachmas; other cases were handed to the arbitrators. If there was an appeal from their award, the case was referred to the Forty and by them brought to trial. The words τὰς ἄλλας δίκας are commonly taken to mean that all private suits except those previously mentioned came within the jurisdiction of the arbitrators;[2] and as far as the Greek is concerned this is the natural interpretation of the words. But the difficulty encountered in attempting to reconcile this interpretation with Aristotle's subsequent statements is practically insurmountable. Among the remaining *dikai* mentioned by Aristotle are those assigned to the three archons and the thesmothetai. Obviously all Aristotle means is that *dikai* not otherwise assigned in his treatise went to the Forty and to the arbitrators. Lipsius[3] chooses to put the δίκη κλοπῆς among the suits handled by the thesmothetai apparently because γραφαὶ κλοπῆς came within the jurisdiction of this board. Lipsius has tried to discover the grounds of distinction between the use of a criminal suit and the use of a civil suit for an act which is essentially a criminal one.[4] But whatever the circumstances of the act that permitted a civil suit for larceny, the δίκη κλοπῆς is, after all, of the same nature as the δίκη βλάβης.

Pischinger cites the case against Pancleon[5] as an arbitration case that came within the jurisdiction of the thesmothetai. In his opinion it has to do with citizenship, *status civita-*

[1] *Ibid.* liii. 1.

[2] Cf. Sandys, *ad loc.*; Lipsius, *Berichte der Sächischen Gesellschaft*, XLIII (1891), 54 f.

[3] *Op. cit.*, p. 438. [4] Demos. xxiv. 113–14. [5] Lysias xxiii.

tis. Lipsius[1] approves of the assignment to the thesmothetai. Much confusion regarding the case has arisen from the mixture of the original case against Pancleon with the proceedings to determine whether Pancleon was a slave belonging to either of two persons who claimed him. The original case against Pancleon is as follows:

It is evident that the speaker filed a suit with the polemarch, the character of which he does not specify beyond saying that Pancleon had for a long time injured him (*ἀδικῶν με πολὺν χρόνον οὐκ ἐπαύετο*) and that he filed a suit against him. For he proceeded to the place where Pancleon worked and summoned him to appear before the polemarch, "believing him to be a metic." Pancleon protested that he was a Plataean and so not a metic, as Plataeans had citizen rights. At the suggestion of one of his witnesses the speaker found out by questions that Pancleon claimed to be of the deme of Decelea and the tribe of Hippothoöntis. Accordingly he summoned him also before the section of the Forty which had jurisdiction over cases in which the defendant was of the tribe of Hippothoöntis.[2] It is not explained how a plaintiff could summon a man before two courts at once nor does it really matter. They are alternative summons.[3] The important thing to notice is that the speaker believed that the case would be assigned to the Forty for arbitration if the polemarch finally accepted it. Otherwise he would not have summoned Pancleon as a citizen before the Forty. The rest of the speech need not concern us. It is enough that the case against Pancleon came under the jurisdiction of the Forty and the arbitrators either directly or from the polemarch. Consequently, this case must be stricken from the list of Pischinger.[4]

Another so-called *status civitatis* case listed by Pischinger as being within the jurisdiction of the thesmothetai is men-

[1] *Op. cit.*, p. 228, n. 31.

[2] Lysias xxiii. 2: *προσκαλεσάμενος αὐτὸν καὶ πρὸς τοὺς τῇ Ἱπποθωντίδι δικάζοντας.*

[3] Cf. Wilamowitz, *Aristoteles und Athen*, II, 370.

[4] Cf. Gomme, "Two Problems of Athenian Citizenship Law," *CP*, XXIX, 127, n. 9.

tioned in *Theomnestus* v. *Neaera*.[1] Phrastor had married Phano supposing that she was the daughter of Stephanus by a former wife, but when he discovered she was really the daughter of a notorious woman who cohabited with Stephanus, he divorced her while she was with child. Afterward Phrastor fell ill and Phano with her mother Neaera went to his house and nursed him. It is claimed that under these circumstances he was influenced to adopt the son whom Phano had in the meantime borne. Accordingly pursuing this purpose, he introduced the boy to his phratry and the members of the Brutidae, the family to which he belonged. But they rejected him. Phrastor then entered suit (*λαχόντος δὲ τοῦ Φράστορος αὐτοῖς δίκην ὅτι οὐκ ἐνέγραφον αὐτοῦ υἱόν*).[2] The case came before an arbitrator and the clan members challenged Phrastor to take an evidentiary oath that "he verily believed the boy to be his own son by an Athenian woman lawfully married to him." If he had sworn the solemn oath the son would have been accepted by the clan, but he refused and that settled the case against him. What was the nature of the original suit which he brought against the *γεννῆται*? One is inevitably reminded of *Boeotus and Pamphilus* v. *Mantias* already discussed.[3] There a woman is tendered the oath regarding the paternity of her sons; here a man is tendered an oath regarding the maternity of a son. Lipsius[4] regards the latter case as coming within the jurisdiction of the thesmothetai because he considers it similar to the appeal (*ἔφεσις*) from the verdict of a deme assembly striking a man from the rolls. But the analogy is false for, so far as is known, there is no appeal to a dicastery from the vote of a clan. The only remedy was suit for damages (*δίκη βλάβης*) against the clansmen which came before the Forty and was subject to arbitration.

Another citizenship case that came before an arbitrator was that of *Euphiletus* v. *The Deme of Erichia*,[5] which is de-

[1] Demos. lix.

[2] *Ibid.* 60.

[3] *Ibid.* xl. 9 ff.; cf. *supra*, pp. 107 f.

[4] *Op. cit.*, p. 629.

[5] Isaeus xii, quoted by Dionysius of Halicarnassus (*De Isaeo judicium* 17).

scribed by Dionysius of Halicarnassus as an appeal to a dicastery (ἔφεσις εἰς τὸ δικαστήριον)[1] against expulsion from the deme by a διαψήφισις ordered by a decree of Demophilus of the year 346–345 B.C.[2] The case presents unusual difficulties. Lipsius classifies it as a *diké* within the jurisdiction of the thesmothetai, although the penalty in case the appeal failed was sale of the appellant into slavery.[3] But Aristotle's language seems to place such suits neither among the *graphai* nor among the *dikai*. After enumerating the *graphai* which came before the thesmothetai, Aristotle adds: εἰσάγουσι . . . . δίκας ἰδίας.[4] Wyse[5] regards it as a public case within the jurisdiction of the thesmothetai and explains the appearance of the arbitrators as an extraordinary measure due to the large number of cases that came before the thesmothetai as a result of the general διαψήφισις. An acceptable solution of the case has been proposed by Diller.[6] The date of Isaeus xii must be placed after 346–345 B.C. if it is to be classified as an appeal under the provisions of the decree of Demophilus. It has been observed that this is late for a speech of Isaeus by ten years.[7] Diller suggests that "Dionysius simply confused the pre- and post-Demophilean type of scrutiny and that the fragment of Isaeus (i.e. xii) . . . . belongs to a δίκη of the pre-Demophilean type." There is considerable evidence to support this view. Demosthenes lvii is described as ἔφεσις πρὸς Εὐβουλίδην, the demarch of Halimus. The Hypothesis of Libanius describes it as an appeal under an Athenian law providing for scrutinies of the citizen lists and appeals in the case of those rejected. The author of the law was Demophilus. Dionysius introduces his citation from Isaeus, now printed as Oration xii, in practically the same

[1] *Ibid.* 16.

[2] Aeschin. i. 86; Harpocration, *s.v.* διαψήφισις.

[3] Lipsius, *op. cit.*, pp. 247, 415, 628–29. Cf. Gomme, *op. cit.*, pp. 130 ff., for arguments against the application of this verdict to any but persons proved to be slaves.

[4] *Ath. Pol.* lix. 5.

[5] *The Speeches of Isaeus*, pp. 716 f.

[6] *TAPA*, LXIII, 193 ff.

[7] The latest date given by Thalheim (*Isaeus*, p. xxxiv) is 353 B.C. for Or. vii; cf. Wyse (*op. cit.*, p. 715), who reluctantly accepts the date after 346–345 B.C.

terms as the Hypothesis of Libanius.[1] The two speeches have been regarded as dealing with the same type of case. And yet there are marked differences. In Isaeus xii arbitrators are mentioned, but Demosthenes lvii could not have come before an arbitrator because it was proposed to introduce at the trial evidence which had not been produced before; whereas in an arbitration case all evidence had to be produced before the arbitrator.[2] The fact that there was no arbitration in the Eubulides case shows that it was not the same kind of case as the Euphiletus case. There is no direct statement in the speech against Eubulides that the defendant was liable to sale as a slave, but there are phrases that indicate that his fate would be deplorable.[3] His threat at the end to commit suicide if the verdict be against him seems to indicate that he was threatened with more than the loss of citizenship.[4] If Gomme is right in supposing that the verdict "slavery" was only for appellants who turned out to be slaves, the absence of any reference to slavery is only natural. In the Isaeus case, however, the only statement of any significance is that Euphiletus has been unjustly mistreated (*ἀδίκως ὑβρίσθη*), and that applies not to the effect of an adverse verdict but to the treatment which is the basis of his complaint. Obviously we have here a *δίκη βλάβης* just as in the cases of Boeotus and his brother, Pamphilus, and Phrastor.[5]

[1] Aristotle (*Ath. Pol.* xlii), in discussing the franchise, describes the appeal allowed to men rejected on scrutiny.

[2] Bonner, *Evidence in Athenian Courts*, pp. 52 ff. Gomme (*op. cit.*, p. 128) admits that new evidence was produced but adds that its importance must not be exaggerated. In view of Aristotle's statement that no evidence can be introduced in an appeal from arbitration, it is surely no exaggeration to conclude that if new evidence was introduced in a case the case had not been subject to arbitration.

[3] E.g., *ἀπολέσθαι* (lvii. 18).

[4] "I was left by my father an orphan. On behalf of my mother I conjure and beseech you—let the issue of this trial be, that you restore to me the right of burying her in our hereditary monuments. Do not preclude me from this—do not make me an outcast— do not sever me from communion with all my relatives, numerous as they are, and utterly destroy me. Rather than abandon them, if it is impossible for them to save me, I will kill myself, so that at least I may be buried by them in my country" (Demos. lvii. 70 [trans. Kennedy]).

[5] Cf. *supra*, pp. 107 f. and 112.

This concludes Pischinger's list of arbitration cases that he, followed by Lipsius, regarded as falling within the jurisdiction of the archon or the thesmothetai. It is clear that they all belong to the jurisdiction of the Forty and that there is nothing in the orators at variance with the natural conclusion to be drawn from Aristotle, namely, that the only arbitration cases were those which came before the Forty directly or through the medium of the polemarch.

In the Appendix to his excellent study of public arbitration in Athenian law Harrell[1] has compiled the following list of arbitration cases from the Attic orators:

1. *δίκη αἰκείας* (Lipsius, p. 643) (Isoc. xx.)
Demos. xlvii. Cf. sec. 45.
Demos. liv.

That this suit came under the Forty is stated in Demos. xxxvii. 33, a speech delivered *c.* 346/5 B.C. By the time of Aristotle it had evidently become one of the monthly suits; cf. *Ath. Pol.* lii. 2.

2. *δίκη ἀργυρίου* (Lipsius, p. 726) (Demos. lii. Cf. sec. 14.)
(Demos. xxxix. 25.)

3. *δίκη ἀφορμῆς* (Lipsius, p. 725) Demos. xxxvi. Cf. sec. 12.

Aristotle mentions (lii. 2) a monthly suit under this name. But he probably had in mind only a specific suit, not all suits of this class, since he qualifies it with a further description. There were sometimes, it seems, suits with the same name, but under different classifications; cf. 11 below. Otherwise we must assume that the Forty lost jurisdiction here as in the case of no. 1 above.

4. *δίκη βιαίων* (Lipsius, p. 637) Demos. xxv. 55. Cf. sec. 58. (?)
Aeschin. i, 62–63. Cf. Lipsius, p. 642, n. 21.

5. *δίκη βλάβης* (Lipsius, p. 652) (Isoc. xvi.)
(Isoc. xviii. Cf. secs. 11, 12.)
(Hyper. iii.)
(Demos. xxxviii.)

[1] *Public Arbitration in Athenian Law*, "University of Missouri Studies," XI, No. 1, 36 ff. "The list includes two classes of suits: (*a*) those containing specific internal evidence of arbitration; (*b*) those containing no specific mention of arbitration, but which may reasonably be presumed to have undergone arbitration. Suits under the latter classification have been enclosed in parentheses. The exact identification is often purely a matter of conjecture, but it is hoped this list will answer most practical purposes."

Demos. xxxix. 37. Cf. Lipsius, p. 660, n. 89.
Demos. xlviii. Cf. sec. 48.
Demos. lii. 14.
Demos. lv. 2.

Mercantile suits of this type had to be decided within a month and therefore were not subject to arbitration. As such are probably to be recognized the following: Demos. xxxiii. 12; cf. Lipsius, p. 644, n. 28; p. 657, n. 77. Demos. xxxvii. 22; Lipsius, p. 652; p. 656, n. 74. Demos. lvi (?); Lipsius, pp. 657, 631, 633.

6. *δίκη ἐγγύης* (Lipsius, p. 688) (Isaeus v, secs. 1, 31; cf. Wyse, *ad. loc.*)

7. *δίκη ἐξούλης* (?) (Lipsius, p. 664) (Isaeus v. 22.)
(Demos. xxx.)
(Demos. xl. 34. Cf. xxi. 81.)

8. *δίκη ἐπιτροπῆς* Lysias xxxii. Cf. sec. 2.
Demos. xxvii, xxviii. Cf. xxvii. 49 f.

Usually considered, e.g., by Lipsius, pp. 532 f., as coming under the archon, but without evidence. The presence of arbitral procedure in both cases points to the jurisdiction of the Forty.

9. *δίκη κακηγορίας* (Lipsius, p. 646) Lysias x. 6.
Demos. xxi. 81.

10. *δίκη κλοπῆς* under the Forty and subject to arbitration Demos. xxii. 27; xxiv. 114.

11. *δίκη προικός* (Lipsius, p. 497, n. 101) Demos. xl. 16–17.
Demos. xli. Cf. sec. 12.

To be distinguished from the monthly suit under the same name mentioned in Arist. *Ath. Pol.* lii. 2.

12. *δίκη χρέως* (Lipsius, p. 725; cf. p. 717, n. 149) Lysias *Frag.* xvi (Thalheim)
Demos. xlix. 19.

Mercantile suits of this type not subject to arbitration are: Demos. xxxiv; cf. Lipsius, p. 633; Demos. xxxv.

13. *Status Familiae vel Civitatis* Isaeus xii. Cf. sec. 11.
Demos. xxxix. 2. Cf. xl. 9.
Demos. lix. 60.

CHAPTER VI

WITNESSES

From the time of Solomon to the present day all judges and jurors have been faced with the problem of determining the credibility of litigants and their witnesses in the cases that come before them. There are no witnesses in Homer. In the famous trial scene the litigants alone appeared. The judges were to give the award to the litigant who told the straightest story (*τῷ δόμεν, ὃς μετὰ τοῖσι δίκην ἰθύνταται εἴποι*).[1] In other words, the judges' decision was determined by their impressions of the relative credibility of the litigants. Solomon devised an apt and unique test of the credibility of the claimants for a child. But such a convincing test could rarely be devised.

Witnesses first appear in Hesiod.[2] In Athens witnesses were used before the time of Solon;[3] and in the time of the orators witnesses in large numbers were used on all occasions. There was one exception: when a man borrowed money from

[1] *Iliad* xviii. 508. For a discussion of the trial scene cf. *supra*, I, 31 ff. Subsequently to this discussion there appeared in 1931 the second volume of Ridgeway, *Early Age of Greece*, in which the whole question of the interpretation of the trial scene is again raised (pp. 360 ff.). Ridgeway's main point, that the metaphor of "straightness" or "crookedness" is always used of judges but never of litigants, he seeks to support by a formidable array of citations. But a negative statement about Greek usage is a bit hazardous. According to the interpretation of Ridgeway there is no statement in the description of the trial regarding the manner in which a verdict was reached. We are told that the judge who gave the best verdict got the two talents. The reader is left to guess who made the award and also to wonder on what basis such an award could be made. But Ridgeway does not realize that the interest in any trial centers not in the judges but in the litigants and their speeches. Homer shows that he is well aware of this principle and devotes the three concluding lines of the passage to the litigants and not to the judges and thereby completes his description of a trial. It was sufficient to say that the judges sat on stone seats in the agora with staves in their hands.

[2] Cf. *supra*, I, 49. For a suggestion regarding the origin of witnesses cf. *supra*, I, 41–42; Leisi, *Der Zeuge*, pp. 142–43.

[3] Cf. *supra*, I, 173 ff.

a banker he took no witnesses, for the banker had his books as evidence of the loan.[1] A client of Demosthenes remarks in a cynical vein that men borrow in private and repay in public.[2]

In the orators the litigant is always represented as summoning his opponent with two witnesses. But it is clear from Aristophanes that only one was necessary.[3]

Among citizens those only were competent witnesses who were adult males not disqualified by *atimia*. Parties to a suit were not competent witnesses in their own cases.[4] Free aliens, with one possible exception, could be witnesses in all cases but their own.[5] Demosthenes in his speech *On the Embassy* proposed to confirm some of his statements by testifying in his own behalf and rendering himself liable to a *δίκη ψευδομαρτυρίων*:

> To prove the truth of my statements, in the first place, I will draw up my own deposition and make myself responsible as a witness; in the next place, I call each of the other ambassadors, and will force them to do one or the other, to give testimony or swear they are unable. If they swear they are unable, I shall convict them of perjury before you clearly.[6]

But this is a mere rhetorical trick to impress the dicasts with his sincerity where he is not certain that the witnesses whom he proposes to call will testify.[7]

What interest in a suit made a person a party to it? Could a *κύριος* both plead and testify for a woman or a minor liti-

[1] Isoc. xvii. 2. [2] Demos. xxxiv. 30.

[3] *Clouds* 1218; *Wasps* 1408, 1416. An inscription found in Decelea shows that upon the introduction of a new member into the phratry three witnesses were present (*IG*², II, 1237; Simon, *Wiener Studien*, XII, 70).

[4] Demos. xl. 58: *μάρτυρες μέν εἰσιν οὗτοι, οἷς μὴ μέτεστι τοῦ πράγματος περὶ οὗ ἡ δίκη ἐστίν*; xlvi. 9: *μαρτυρεῖν γὰρ οἱ νόμοι οὐκ ἐῶσιν αὐτὸν αὐτῷ οὔτ' ἐπὶ ταῖς γραφαῖς οὔτ' ἐπὶ ταῖς δίκαις οὔτ' ἐν ταῖς εὐθύναις*. As Leisi (*op. cit.*, p. 28) points out, this incompetency is accidental.

[5] Cf. Leisi, *op. cit.*, p. 7, for a list of non-citizen witnesses. According to Harpocration, *s.v. διαμαρτυρία* (cf. Leisi, pp. 30 f.), a foreigner could not enter a *diamartyria* in a *δίκη ἀποστασίου* although metics and *isoteleis* could do so.

[6] xix. 176.

[7] Cf. Leisi, *op. cit.*, p. 28; Lipsius, *Das Attische Recht*, pp. 875–76.

gant? In Isaeus,[1] Xenocles the husband and *κύριος* of Phile laid claim to the estate of Pyrrhus in her behalf and made a *diamartyria* to the effect that the estate could not be claimed by Phile's rival claimant because Phile was the legitimate daughter of Pyrrhus.[2] Similarly in another case in Isaeus, *Chaerestratus* v. *Androcles*,[3] Androcles as *ἐπίτροπος* of the children of Alce claimed the estate of Euctemon in their behalf and made a *diamartyria*. It is for bearing false witness in this *diamartyria* that he is being prosecuted in this case. In a speech attributed to Demosthenes,[4] Leostratus was claimant to the estate of Archiades, and his son Leochares handled the case for his father and made a *diamartyria*. In effect, then, Leochares made an affidavit in his own behalf because his interest in the case was such that he could not be included with those *οἷς μὴ μέτεστι τοῦ πράγματος περὶ οὗ ἡ δίκη ἐστίν*.[5] The reason for this exception is because in matters involving the devolution of estates few persons outside those immediately interested could be found who had enough knowledge of the facts to risk a prosecution for false witness.

There are some cases where it is difficult to discover whether a given person has a sufficient interest in a suit to be regarded as an incompetent witness. In *Mantitheus* v. *Boeotus*[6] the plaintiff complains that one Crito who was a witness against him was really an opponent (*οὐ μαρτυρεῖ τούτῳ νῦν ἀλλ' ἐμοὶ ἀντιδικεῖ*), but it is impossible to determine from the speech the nature of Crito's interest in the litigation.[7] In a bottomry case, *Chrysippus* v. *Phormio*,[8] Lampis, a ship captain, had an interest in the case because whichever party won he might be held liable rightly or wrongly for a sum of money said to have been intrusted to him. And yet the plaintiff com-

[1] iii. 2–3.

[2] Cf. Wyse, *The Speeches of Isaeus*, pp. 273 ff.; Lipsius, *op. cit.*, p. 859, n. 45.

[3] vi. 10, 26, 46, 53, 58; cf. Lipsius, *op. cit.*

[4] xliv. 46, 54; cf. Lipsius, *op. cit.*, p. 859.

[5] Demos. xl. 58. [6] *Ibid.*

[7] Cf. Sandys and Paley, *Demosthenes' Select Private Orations*, I, 242–43.

[8] Demos. xxxiv. 11, 46.

plains that his evidence was not offered. In another bottomry case, *Zenothemis* v. *Demon*,[1] the plaintiff laid claim to a cargo of wheat on the ground that it had been mortgaged to him by the captain, who had been drowned on the homeward voyage. But the defendant claimed that he had lent the money for the purchase of the cargo to a merchant named Protus and proposed to call Protus to give testimony. And yet Protus had an interest in the suit, for if Zenothemis got the cargo Demon would in all probability have sued Protus for the loan.

Under these circumstances it would be unwise to attach much importance to the protests of litigants against a witness on the ground of interest. In practice, at least, no one was prevented from appearing as a witness by reason of interest, unless he was actually a party to the suit, and even then he was allowed in inheritance cases to put in an affidavit, *diamartyria*, that the estate of the deceased was not subject to litigation on the ground that there was legitimate issue of the deceased alive.[2] The representatives of women or children were allowed to make a *diamartyria* under the same circumstances. The affiant in these cases was liable to a *δίκη ψευδομαρτυρίων* and is thus actually a witness in his own behalf.[3]

In most classes of incompetency there are virtual exceptions. Although a party to a suit could not be a witness, yet the confession of a defendant is excellent evidence. Thus a homicide might at the end of the first speech of the prosecutor withdraw from the case and go into exile. His acceptance of the penalty of exile is tantamount to a confession that he is guilty. If he returns illegally from exile he is subject to the death penalty.[4] Andocides, after confessing his guilt in the

[1] *Ibid.* xxxii. 30.

[2] *Ibid.* xliv. 54–55; cf. Meier-Schömann-Lipsius, *Der Attische Process*, p. 847, n. 227. It is possible that Demosthenes is not stating an actual rule of law, but is merely seeking to discredit the testimony on the ground of interest or hearsay.

[3] Isaeus iii. 3.

[4] Demos. xxiii. 28; Pollux viii. 117 excepts parricides; cf. *infra*, p. 231; Gilbert, *Const. Antiqu.*, p. 387.

mutilation of the Hermae, was excluded from the agora and the holy places. This *atimia* was inflicted by the decree of Isotimides excluding from public places those who confessed impiety. Anyone liable under this decree could be prosecuted on the basis of his confession.[1] Malefactors (*κακοῦργοι*), when summarily arrested, could be executed by the Eleven at once if they confessed. The confession was made before trial. Indeed, there was no regular trial in a dicastic court, as is shown by the fact that if they denied their guilt they were brought to trial.[2] But it is a mistake to take the implication of Aristotle's language or the statement of Demosthenes to mean that there was no judicial action. The point is that the Eleven could on their own authority exercise judicial functions where the accused person confessed. It is another relic of the pre-Solonian judicial power of the magistrates.[3] It is idle to suppose that the Eleven made no inquiry at all or did not discuss the case among themselves. Experience has shown that in modern times persons have for various reasons confessed to crimes which they did not in fact commit. Hence the practice of carefully checking every item in a confession before bringing the case to trial.

The unexplained failure of a party to appear for the trial was sufficient evidence for a verdict by default.[4] In a public prosecution, if the defendant fled the country his flight was regarded as a confession of guilt and he was forthwith condemned *in absentia*.[5] The prosecution in the Herodes murder case had read in court a letter written by Euxitheus, the defendant, announcing to one Lycinus that he had killed

[1] Andoc. i. 71; Lysias vi. 24.

[2] Arist. *Ath. Pol.* lii. 1: *ἂν δ' ἀμφισβητῶσιν* (the Eleven) *εἰσάξοντας εἰς τὸ δικαστήριον.*

[3] Cf. *ibid.* iii. 5; *supra*, I, 279 ff.

[4] Demos. xxi. 81. An appeal against a verdict by default could be taken. Often there were perfectly reasonable grounds for not appearing; cf. Meier-Schömann-Lipsius, *op. cit.*, pp. 973 ff.

[5] Lycurg. i. 117: *Ἵππαρχον γὰρ τὸν Τιμάρχου οὐχ ὑπομείναντα τὴν περὶ τῆς προδοσίας ἐν τῷ δήμῳ κρίσιν, ἀλλ' ἔρημον τὸν ἀγῶνα ἐάσαντα, θανάτῳ τοῦτον ζημιώσαντες.*

Herodes. Such a letter, if proved to be genuine, would amount to a confession and be conclusive evidence.[1]

A litigant always had the right to question his opponent in court.[2] These examinations are survivals of the old pre-Solonian trial before a magistrate and constitute the nearest Athenian approach to modern testimonial evidence. In the few interrogatories that have been preserved little or no information of value is discovered. In Lysias[3] the grain-dealers charged with profiteering, upon being questioned in court, admitted the charge, but they claimed they had official sanction for what they had done. Lysias' own interrogation of Eratosthenes was probably distressing for Eratosthenes and may have had some effect on the dicasts, but it produced nothing new. Eratosthenes, like the grain-dealers, admitted that he arrested Polemarchus but pleaded that he was acting under orders.[4] At best it was a rhetorical device to embarrass one's opponent rather than a means for securing information. Thus in the *Acharnians*[5] of Aristophanes the old men complain that in litigation they fall easy victims to young prosecutors skilled in the new rhetoric who "called them up and cross-examined them, setting little verbal traps." A good illustration of what Aristophanes has in mind is Socrates' examination of Meletus, who makes damaging admissions.[6] The importance attached to these interrogatories is shown by the fact that some attention was paid to them in books on rhetoric.[7] In the hands of an expert they might be useful, but they were both useless and dangerous to a man who bought his speech. For these and other reasons interrogations were abandoned by the speech-writers, although men who conducted their own cases may well have continued to use them. Technically, however, the admissions of an opponent in court could not be classed as evidence, because a *δίκη ψευδομαρτυρίων* could not be brought against him.

[1] Antiph. v. 53 ff. The defendant claimed the letter was a forgery.

[2] Cf. *supra*, p. 8.

[3] xxii. 5.

[4] xii. 25.

[5] 687.

[6] Plato *Apol.* 24C ff.

[7] Anaximenes xxxvi, in Spengel-Hammer, *Rhetores Graeci*, I, 94 f.

The role played by evidence in an Athenian court is quite different from its role in modern practice. If one should read merely the depositions and other documentary evidence presented at a trial in the fourth century, he would know very little about the case compared with the jury who heard the speeches also in an Athenian court; but a perusal of a transcript of the evidence in a modern trial would yield the reader as much knowledge of the facts as had the jury which gave the verdict. To put the matter in another way: In Athens the dicasts looked to the speaker for the law and facts and to the witnesses for corroboration; with us the jury looks to the witnesses for the facts and to the judge and counsel for the law and an integration of the results of examination and cross-examination of the witnesses. The litigants appear only as witnesses.

In Athens the evidentiary character of a forensic speech was well understood. The better speech-writers always had in view the credibility of the speaker. They considered it important that both the speech and the thought should by their simplicity and candor render the speaker worthy of confidence. This feature of their professional work was known as *ethopoiia*. In the hands of a skilled writer like Lysias[1] it became a most effective instrument of persuasion, for Athenian dicasts, like any other judges, were largely influenced by their opinion of the moral worth of a litigant. There was little or no chance to judge of the credibility of a witness who stood facing the dicasts while his affidavit was being read, and with a bow acknowledged it as his own. Before the period of written evidence the situation was not much better, whether the witness told his brief story of confirmation in his own way or, as is more likely, answered the questions of the litigant who called him.[2] In the absence of an opportunity to cross-exam-

[1] Cf. Devries, *Ethopoiia: A Rhetorical Study of the Types of Character in the Orations of Lysias;* Egger, *Mémoires de littérature ancienne*, p. 372.

[2] Aristoph. *Wasps* 962–65:

ἄκουσον ὦ δαιμόνιέ μου τῶν μαρτύρων.
ἀνάβηθι, τυρόκνηστι, καὶ λέξον μέγα·
σὺ γὰρ ταμιεύουσ' ἔτυχες. ἀπόκριναι σαφῶς,
εἰ μὴ κατέκνησας τοῖς στρατιώταις ἅλαβες.

ine witnesses the opposing litigant had to adopt other means of discrediting and impeaching witnesses.[1]

Speeches are often prefaced by promises to tell the whole truth, or by an excuse that the speaker, owing to his youth or absence from the city at a certain time, is hampered in presenting the case by lack of firsthand knowledge of the facts.[2] One of Isocrates' clients, with the purpose of discrediting his opponent's statements, introduced evidence to show that on a previous occasion he had been guilty of perjury.[3] Demosthenes even argues that the law against hearsay evidence ought in justice to be observed by prosecutors in their speeches.[4] The practice of swearing to pleadings was some check on false statements, even though the oaths were formal and did not render one liable to a prosecution of any kind.[5]

Not infrequently a man found it impossible to procure corroborative testimony and had to go into court with nothing but his bare speech.[6] That juries did believe the unconfirmed statements of a litigant is clear from a case in the Demosthenic corpus.[7] The statements of an advocate involving matters of fact were not corroborated by evidence directly though they might rest on evidence in the speech of the principal.[8] The advocate himself might be a witness.[9] Certain types of information were regularly given in a speech without direct confirmation. Thus a speaker might tell something for which his mother could vouch, with or without a challenge to accept her oath.[10]

[1] Cf. *infra*, pp. 135 f.

[2] Antiph. v. 74; vi. 14; Andoc. i. 55; Lysias i. 5; xxxi. 4; Demos. xxvii. 2; xxxviii. 6.

[3] Isoc. xviii. 52, 57. [4] Demos. lvii. 4.

[5] Antiph. vi. 14; Demos. xxxiii. 14; Andoc. i. 55; but cf. Antiph. i. 28.

[6] Cf. Isoc. xxi; Antiph. i. Blass (*Attische Beredsamkeit*, I², 189) thinks that proof of the father's dying injunctions may have been given before the speech. This is very unlikely. Gernet (*Antiphon: Discours*, pp. 36 f.) believes that the rule requiring all witnesses to swear to the guilt or innocence of the defendant in homicide cases (Lysias iv. 4) accounts for the lack of witnesses.

[7] xliii. 9–10, 30. [8] Isaeus iv. [9] *Ibid.* xii. 4; Aeschin. ii. 170, 184.

[10] Demos. xxvii. 40; cf. lv. 23–24, where the speaker recites what he learned from his mother: *καὶ λέγω μὲν ἅ περ ἤκουσα τῆς μητρός, οὕτως ἐμοὶ πολλὰ ἀγαθὰ γένοιτο, εἰ δὲ ψεύδομαι, τἀναντία τούτων.* Cf. *ibid.* 27, where a challenge to an oath is offered.

Another type of corroboration to which speakers appeal is the knowledge of the dicasts as individuals. These appeals were rather common[1] and of some advantage, as may be inferred from efforts made to discredit them. A speaker in the Demosthenic corpus says that those who have nothing truthful to say and no evidence to produce are accustomed to appeal to the knowledge of the dicasts.[2] Sometimes the speaker apologizes for confirming by evidence matters well known to the dicasts.[3] It was customary to ask those dicasts who knew to inform their neighbors.[4] Naturally the dicasts could be called upon as confirmatory witnesses only in matters of public knowledge.[5] The private information of a few individuals among five hundred would be of little or no avail.

Women were not competent witnesses except in homicide cases.[6] As women lived a secluded life and had no contact with business or affairs, their incompetency did not materially affect the administration of justice as it would in a modern community. Besides, many of the hardships that their incompetency might have caused could be mitigated by various expedients well known to all litigants. The information possessed by a woman could be included in the speech of the litigant without confirmation, or it could come under the exceptions to hearsay evidence.[7] A woman could also take an evidentiary oath and testify if both parties were willing.[8] There is one case in which the account-books of a woman recording debts owing her were admitted.[9] Minors, like women, were not competent witnesses except in homicide

[1] Antiph. vi. 25; Lysias x. 1; Demos. xxi. 80; xxxiv. 50; xliv. 67.

[2] Demos. xl. 53: *ὥστε περὶ ὧν ἂν μὴ ἔχῃ μαρτυρίας παρασχέσθαι, ταῦτα φήσει ὑμᾶς εἰδέναι, ὦ ἄνδρες δικασταί, ὃ πάντες ποιοῦσιν οἱ μηδὲν ὑγιὲς λέγοντες.*

[3] Lysias xii. 61; cf. Demos. lvii. 33.

[4] In Demos. xl. 54 the jurors are warned not to let such appeals in this case go unchallenged.

[5] *Ibid.* xxi. 18.

[6] For women and children as witnesses in homicide cases cf. *infra*, pp. 221 ff.

[7] Cf. *infra*, pp. 130 f. [8] Cf. *infra*, p. 159. [9] Demos. xli. 9, 19, 24.

cases. But on reaching majority one could testify to what he knew while he was a minor.[1]

The testimony of slaves could not be produced in court unless it was given under torture.[2] A passage from Antiphon has been cited to show that the statement of a slave might be accepted as trustworthy without torture. The situation is as follows. A choregus had been informally accused of homicide by the brother of the deceased in a court where the choregus was to begin a prosecution of some officials for malversation of public moneys. It must be remembered that the suit had not yet been filed with the king archon. In answer to this informal accusation the choregus proclaimed before the same dicasts that more than fifty persons, bond and free, young and old, knew the real facts of the case, and challenged the brother of the boy to find out the facts from these individuals before he took action. He was to *ἐλέγχειν τοὺς μὲν ἐλευθέρους ὡς χρὴ τοὺς ἐλευθέρους . . . . τοὺς δὲ δούλους, εἰ μὲν αὐτῷ ἐρωτῶντι τἀληθῆ δοκοῖεν λέγειν, εἰ δὲ μή, ἕτοιμος ᾖ 'εκδιδόναι βασανίζειν*.[3] The whole proceeding was extra-judicial. In fact the choregus hoped that as a result of this investigation there would be no prosecution.[4] Leisi[5] quotes another passage from Isocrates where Pasion the banker agreed to produce one Kittus for torture, but when the plaintiff demanded that the *βασανισταί* scourge and rack the slave until they got the truth out of him, Pasion objected and *ἐκέλευε λόγῳ πυνθάνεσθαι παρὰ τοῦ παιδός*.[6] Owing to this disagreement the questioning was dropped. If Pasion was right in his contention that there was to be no torture but a sort of formal examination for discovery ((*λόγῳ μὲν ἐκέλευσε βασανίζειν, ἔργῳ δ' οὐκ εἴα*)[7] in order to settle the matter in dispute without legal proceedings, we have here an attempt to have the dispute settled without a trial.

[1] Cf. Lipsius, *op. cit.*, p. 874, n. 32.

[2] Cf. *infra*, pp. 223 ff.

[3] Antiph. vi. 23; cf. Lipsius, *op. cit.*, p. 888.

[4] On this occasion, as it happened, the king archon refused to entertain the charge because it was too late for him to conclude it during his official year.

[5] *Op. cit.*, p. 20.

[6] Isoc. xvii. 15.

[7] *Ibid.* 17.

Leisi[1] cites another case in the Demosthenic corpus[2] in which the confession of a slave is accepted without torture. But here again the matter is entirely private. It was not uncommon for heirs of the estate to agree to reserve the slaves as common property, to enable either party to obtain by torture or otherwise any property which he suspected the slaves were concealing.[3] In the case cited by Leisi the heirs actually did recover money stolen by a slave belonging to the deceased. They at first threatened to torture him, but when he confessed (*αὐτοῦ κατεῖπε*) and produced the money he had stolen, naturally they accepted his statement. These cases in no wise justify us in assuming that even by agreement of the parties statements of slaves made without torture would be accepted in court. They could of course be valid by agreement for the settlement of an issue out of court, as in the case of the claim against Pasion the banker, if the agreement to torture had been carried out and the *βασανισταί* like private arbitrators had given their award.[4] Such free statements of slaves might come up indirectly before a court if a party to such a settlement refused to abide by it and resorted to legal proceedings.[5]

Among commonplaces taught to students of rhetoric for use in forensic speeches were those praising or disparaging the testimony of slaves extracted by torture. In the orators these commonplaces, variously worded, appear frequently.[6] Arguments both for and against torture as a means of securing reliable evidence appear in the same orator.[7] The perusal of these commonplaces found in the extant orations will con-

[1] *Op. cit.*, p. 21.

[2] xlviii. 16 ff.

[3] Demos. xl. 15.

[4] Isoc. xvii. 17–18.

[5] Leisi (*op. cit.*, pp. 20 f.) incautiously seems to treat statements such as those contemplated in Antiphon vi. 23 and Isocrates xvii. 15 as evidence in court: "Aber ohne Zweifel war diese Art Beweismittel bei Einverständnis des Produkten vor Gericht zulässig, nach dem oben ausgesprochenen Grundsatz, dass das Gericht die Glaubwürdigkeit der *πίστεις* nicht ex officio untersucht." Lipsius (*op. cit.*, p. 888) cites only one passage and is duly cautious.

[6] Cf. Guggenheim, *Die Bedeutung der Folterung im Attischen Processe*, pp. 62 ff.

[7] Cf. Antiph. v. 31 ff. with vi. 25.

vince any reader that the Athenians attached little importance to βάσανοι. The negative side of the law should be kept in mind. The very fact that it did not permit slave evidence to be accepted without torture shows that they believed the statements of slaves were not trustworthy. Furthermore, the law did not permit a litigant to introduce the testimony of his own slaves even if they had been put to torture by those who made it their business to punish and whip slaves to make them disclose some information.[1] The proper procedure was to challenge one's opponent to put the slave to the question under conditions to be agreed upon. Either the answers were taken down in writing, sealed, and produced in court or those who heard them testified in court, giving the answers in their evidence.[2] Or a litigant might challenge his opponent to permit his slave to be put to the question.

These commonplaces regarding βάσανοι are not uttered to discredit or to support testimony of this kind actually before the court. For there is no single instance in the extant orations in which βάσανοι were produced in court. A litigant praises slave evidence when he claims that his opponent, by refusing to accept a challenge to admit evidence extorted by the rack, has deprived him of the most reliable kind of evidence available. Or he disparages it because he himself has refused to accept his opponent's challenge to permit the introduction of information extracted by torture from his own or another's slave. There are plenty of reasons why a man should distrust all such evidence. There is a note of insincerity about these rhetorical commonplaces. One feels that these challenges and counterchallenges are just moves in the game of litigation. Only two challenges, so far as we know, were accepted, and these were not carried out by reason of disputes as to the terms actually agreed upon.[3] Headlam puts forward the the-

[1] Lysias i. 16–19.

[2] Demos. liii. 24–25; cf. Lipsius, *op. cit.*, p. 894; regarding the possibility of putting slaves to the question in open court cf. *infra*, pp. 129 f.

[3] Isoc. xvii. 19, where the banker was willing to forfeit the sum of money agreed upon if he failed to carry out the contract. Demos. xxxvii. 40 ff. shows how misunderstandings could be promoted by a scheming litigant.

ory that there are no cases which clearly state that the answers of slaves under torture obtained by a πρόκλησις could be brought before a jury.[1] This is a plausible proposition, but the passages quoted by Headlam do not support it.[2]

On two occasions slaves were produced in court as real evidence, which in modern practice has been defined as "all evidence that is addressed directly to the senses of the jury without the intervention of the testimony of witnesses." Such "exhibits" are usually things, but persons are also included in so far as their qualities are those of things. A client of Isocrates was accused of killing a female slave.[3] To refute the charge sworn to by Callimachus, the prosecutor, and fourteen witnesses, the defendant produced the woman alive and well in court. The language of the speaker in commenting on this proof of the unreliability of Callimachus shows clearly that he realizes just the kind of evidence that was presented in the person of the female slave: τοὺς μὲν γὰρ ἄλλους ἐκ τῶν λεγομένων κρίνετε, τὴν δὲ τούτου μαρτυρίαν, ὅτι ψευδὴς ἦν, εἶδον οἱ δικάζοντες.[4] In *Nicobulus* v. *Pantaenetus* a slave named Antigenes is produced for the inspection of the dicasts to show that such a feeble old man could not have committed an assault upon Pantaenetus.[5]

It may be a matter of accident that βάσανοι do not appear in extant cases. Sometimes the evidence of a slave was intended to settle the matter at issue out of court so to speak. Such settlements would not be mentioned unless one of the parties refused to abide by the settlement and took the matter to court. However, the words of Aristophanes in the *Clouds*[6] and Aristotle's classification of βάσανοι as ἄτεχνοι πίστεις[7] show that slaves were put to the question in connection with legal proceedings. The state had power to torture slaves to secure evidence against their masters, but only on

[1] *CR*, VII, 1.

[2] Cf. Thompson, *ibid.*, VIII, 136; Lipsius, *op. cit.*, p. 889, n. 91.

[3] Isoc. xviii. 53 ff. [4] *Ibid.* 56. [5] Demos. xxxvii. 44.

[6] 620: κᾷθ' ὅταν θύειν δέῃ, στρεβλοῦτε καὶ δικάζετε. [7] *Rhet.* i. 15.

rare occasions was this power exercised.[1] When slaves became informers (*μηνυταί*) against their masters or others they received their freedom if the charge was sustained.[2] It seems also that they might be put to the question and afterward set free.[3] Not infrequently the rack was used to extort a confession from a slave suspected of a crime, and such confessions might implicate others.[4]

Hearsay evidence was strictly forbidden in Athenian courts: *οὐδὲ μαρτυρεῖν ἀκοὴν ἐῶσιν οἱ νόμοι, οὐδ' ἐπὶ τοῖς πάνυ φαύλοις ἐγκλήμασιν.*[5] The witness must confine himself to matters of which he had personal knowledge: *ἂν εἰδῇ τις καὶ οἷς ἂν παραγένηται πραττομένοις, ταῦτα μαρτυρεῖν κελεύουσιν* (*οἱ νόμοι*).[6] Exceptions were allowed under certain circumstances, most commonly when the original witness was dead. In the orators this exception is frequently added to the rule (*ἀκοὴν δ' οὐκ ἐῶσι ζῶντος μαρτυρεῖν, ἀλλὰ τεθνεῶτος*).[7] There are few examples of the exception in the case of deceased persons,[8] but there are a number of complaints in the orators that opponents are breaking the law.[9] Plato,[10] in conformity with a genuine forensic speech, represents Socrates as promising that testimony regarding the answer of the oracle "that no one was wiser than Socrates" would be given by the brother of Chaerephon since Chaerephon, the recipient, was deceased.

It was permitted to give hearsay evidence of the statements of those who were incompetent to testify. In one of Demosthenes' cases testimony was produced that a woman

[1] Andoc. i. 22, 64.

[2] Lysias vii. 16; Antiph. v. 34; cf. *Tet.* A. γ. 4. [3] Antiph. v. 31.

[4] *Ibid.* i. 20. Regarding the status of the concubine of Philoneus there has been some dispute. Guggenheim (*op. cit.*, p. 23), after a detailed discussion of the question, rightly concludes that she was a slave. Gernet (*op. cit.*, p. 43, n. 2) agrees. Lipsius (*op. cit.*, p. 895, n. 122), without giving any reason, dissents.

[5] Demos. lvii. 4. [6] *Ibid.* xlvi. 6. [7] *Ibid.* 7; cf. xliv. 55.

[8] Isaeus viii. 14: *τίνας εἰκὸς εἰδέναι τὰ παλαιά; δῆλον ὅτι τοὺς χρωμένους τῷ πάππῳ. μεμαρτυρήκασι τοίνυν ἀκοὴν οὗτοι.* Cf. *ibid.* 29; Demos. xliii. 35–36.

[9] *Ibid.* xliv. 55; xlvi. 7; lvii. 4. [10] *Apol.* 21A.

declared that the seals on a will of her mother were genuine.[1] Normally the evidence of a woman could be presented by her *κύριος*.[2] The evidence of a female metic could be given by her *prostatés*.[3] A litigant could always question his opponent in court,[4] but he usually preferred to produce a witness in whose presence his opponent had made damaging admissions either voluntarily or in answer to questions.[5]

There is another class of persons consisting of men, closely associated with parties to a suit or their witnesses, whose previous statements and admissions are produced in court by the depositions of regular witnesses. In a case in Isaeus[6] the statement of one Hierocles was introduced in evidence—a statement to the effect that he had a certain will in his possession which he had received from the testator. This admission, made somewhat unwillingly by Hierocles, is used by the speaker to the disadvantage of the claimant for the estate, the son of Cleon. Another example is found in *Chrysippus* v. *Phormio*.[7] Lampis, the agent of Phormio, at first denied that he had received a certain sum of money; but later on, having been tampered with by Phormio, he virtually became his witness. Chrysippus then produced evidence of his denial of the receipt of the money in question. A curious instance is related by Aeschines.[8] He called an Olynthian named Aristophanes to give evidence that Demosthenes had approached him to substantiate a discreditable story against Aeschines. For further substantiation Aeschines also called men who were present when Aristophanes told Aeschines of Demosthenes' proposal. Leisi accepts these exceptions to the

[1] xli. 24. Cf. Lysias xxxii, where the woman's story, told before a group of relatives gathered to settle a *δίκη ἐπιτροπῆς* out of court (§§ 12 ff.), is told by the speaker and confirmed by witnesses (§ 18).

[2] Cf. *supra*, pp. 118 f.; Isaeus xii. 5; Demos. lvii. 67 ff., where husbands and relatives testify for women.

[3] Demos. xxv. 56–58.

[4] Cf. *supra*, p. 122.

[5] Demos. xxx. 19–20; l. 37; lviii. 33: *καί μοι κάλει Φιλιππίδην τὸν Παιανιέα, πρὸς ὃν ἔλεγε ταῦτα Θεοκρίνης οὑτοσί, καὶ τοὺς ἄλλους οἳ συνίσασι τούτῳ ταῦτα λέγοντι.*

[6] ix. 6; cf. *infra*, p. 137.

[7] Demos. xxxiv. 11, 46.

[8] ii. 155; cf. Leisi, *op. cit.*, p. 97.

rule against hearsay evidence,[1] and adds another category, including statements of slaves with or without torture, substantiated in court by *Solemnitätszeugen*. This is the correct classification of statements made by slaves. On one occasion Aeschines offers slaves for torture before the dicasts to establish an alibi for himself: *ἄγωμεν δὲ καὶ τοὺς οἰκέτας καὶ παραδιδῶμεν εἰς βάσανον. καὶ τὸν μὲν λόγον, εἰ συγχωρήσει ὁ κατήγορος, καταλύω. παρέσται δὲ ἤδη ὁ δήμιος καὶ βασανιεῖ ἐναντίον ὑμῶν, ἂν κελεύητε.*[2] In the face of a statement of the plaintiff in *Apollodorus* v. *Stephanus*,[3] *βασανίζειν οὐκ ἔστιν ἐναντίον ὑμῶν*, we cannot suppose, even with the support of another passage from Demosthenes[4] or Aristophanes' line *κᾆθ' ὅταν θύειν δέῃ, στρεβλοῦτε καὶ δικάζετε*,[5] that dicasts ever listened to the answers of a slave under torture as they listened to parole evidence and affidavits.[6] A challenge of any kind could be delivered at any time. In the Demosthenes passage the challenge was delivered for greater effect when the dicasts were assembling. Aeschines goes a step farther and delivers one in the court itself with the additional proposal that it could be carried out then and there.[7]

Exceptions to the hearsay rule were allowed, as we have seen, when the person who knew the facts was either dead or disqualified; but if a qualified person could not appear in court because of illness or absence from the country, the matter was handled in another fashion. Such testimony was

[1] *Op. cit.*, pp. 96 f. Lipsius (*op. cit.*) brushes all aside except where the original witness is dead.

[2] ii. 126. [3] Demos. xlv. 16.

[4] xlvii. 17: *ἔδει αὐτὸν . . . . κληρουμένων τῶν δικαστηρίων κομίσαντα τὴν ἄνθρωπον . . . . κελεύειν ἐμέ εἰ βουλοίμην βασανίζειν καὶ μάρτυρας τοὺς δικαστὰς εἰσιόντας ποιεῖσθαι ὡς ἕτοιμός ἐστι παραδοῦναι.*

[5] *Clouds* 620.

[6] Guggenheim's ingenuity in trying to reconcile these passages (*op. cit.*, pp. 37 ff.) is wasted: "Wir nehmen gerne an, dass dem Redner es genügte, dass Folterung vor Gericht nicht gewöhnlich war, um für seinen Zweck behaupten zu können, sie kommen vor Gericht gar nicht vor."

[7] For the literature cf. Bonner, *Evidence in Athenian Courts*, p. 73; Lipsius, *op. cit.*, p. 892.

called ἐκμαρτυρίαι, i.e., extra-judicial depositions. The evidence of persons who were too ill to attend court, or who were absent from the city at the time of the hearings, could be taken in writing in the presence of a number of persons who afterward on the production of the document in court identified it by an attesting affidavit as the statement of the original witness.[1] The evidence was not taken by any official or a commission appointed by the court.[2] It was the business of the litigant who desired the evidence. No specified number of attesting witnesses was required, but it was wise to have more than one to avoid suspicion.

> When it is a question of obtaining a written deposition [ἐκμαρτυρία] from a witness who is ill or about to go abroad, each of us summons by preference the most reputable among his fellow-citizens and those best known to us, and we always have written depositions[3] made in the presence not of one or two only but of as many witnesses as possible in order to preclude the deponent from denying his deposition at some future date.[4]

There should be two distinct parts of an *ekmartyria*, the first of which contains the facts and the name of the witness who knew them, the second the names of the attesting witnesses and a statement that the *ekmartyria* was in fact made by the extra-judicial witness.[5] A much-disputed series of depositions is found in Demosthenes.[6] In the first passage there is a deposition of one Ersicles and another of Hippias of Halicarnassus to the same effect. Then follow the words πρὸς τούσδε ἐξεμαρτύρησεν, with five names in the nominative case. In the next passage there are three depositions followed by the same words and the names of five witnesses. Lipsius is right in regarding the five depositions as *ekmartyriai* followed

[1] Cf. Aeschin. ii. 19: καὶ τὴν ἐκμαρτυρίαν ἀνάγνωθι τὴν Ἀριστοδήμου, καὶ κάλει πρὸς οὓς ἐξεμαρτύρησεν. Cf. Demos. xlvi. 7: τῶν δὲ ἀδυνάτων καὶ ὑπερορίων ἐκμαρτυρίαν γεγραμμένην ἐν γραμματείῳ.

[2] This is made clear by Leisi (*op. cit.*, p. 98).

[3] ἐκμαρτυρίας should be translated "extra-judicial depositions" to distinguish them from regular depositions, μαρτυρίας.

[4] Isaeus iii. 20–21 (trans. Forster). In this case an *ekmartyria* attested by only two witnesses had been denied (§§ 18, 23).

[5] Aeschin. ii. 19; Demos. xlvi. 7.

[6] xxxv. 20, 33–34.

by the names of the attesting witnesses; *τούσδε* are these witnesses.[1]

The lexicographers seem to identify extra-judicial evidence with hearsay, but Demosthenes carefully differentiates them.[2] The confusions between hearsay and extra-judicial evidence found in the lexicographers may be due to the fact that before the use of written testimony in 378 B.C. there could be no real distinction between the two in form. The only distinction lay in the responsibility. One might hold the sick or the absent responsible if what they said turned out to be false; or the attesting witness could be held responsible if the original witness successfully denied the *ekmartyria* attributed to him.[3] There could be no responsibility on the part of the deceased persons or those incompetent to testify, such as parties to a suit, women and slaves. Only those who reported the statements of such persons could be held responsible.[4]

The *ekmartyriai* which we know belong to the period when written testimony was required by law.[5] We hear nothing of *ekmartyria* in Antiphon, Andocides, and Lysias. And yet it must have been a hardship in many cases before 378 B.C. to be unable in some fashion to produce the evidence of persons who were ill or out of the city. Platner,[6] relying on a passage in Isaeus already quoted,[7] suggests that the testimony of the original witness was not always reduced to writing, because Isaeus says that one always provided a large number of estimable attesting witnesses. This conclusion does not fol-

[1] *Op. cit.*, p. 887, n. 84. This explanation rests upon Drerup (*Jahrb. f. cl. Phil.*, XXIV, 319), which Leisi (*op. cit.*, p. 99, n. 1) had already accepted. Cf. also Platner, *Process und Klagen*, I, 227.

[2] In Isaeus. iii. 77 *ἐκμαρτυρία* is loosely used of evidence which is unquestionably hearsay. The acts of a deceased person showing that he had virtually refused to recognize a woman who claimed to be his daughter are termed *ἐκμαρτυρία*; cf. Aeschin. i. 107 for a use of *ἐκμαρτυρήσοντα* in the sense of *μαρτυρήσοντα*.

[3] Demos. xlvi. 7: *καὶ ἀπὸ τῆς αὐτῆς ἐπισκήψεως τήν τε μαρτυρίαν καὶ ἐκμαρτυρίαν ἀγωνίζεσθαι ἅμα, ἵν' ἐὰν μὲν ἀναδέχηται ὁ ἐκμαρτυρήσας, ἐκεῖνος ὑπόδικος ᾖ τῶν ψευδομαρτυριῶν, ἐὰν δὲ μὴ ἀναδέχηται, οἱ μαρτυρήσαντες τὴν ἐκμαρτυρίαν.*

[4] Cf. Lipsius, *op. cit.*, p. 886.

[5] Demos. xlvi. 7.

[6] *Op. cit.*, p. 226.

[7] iii. 21.

low, however, because this oration belongs to the period when all evidence was required to be written. The language of the lexicographers suggests oral statements but is not inconsistent with affidavits: *καὶ ὁμοίως ἐκμαρτυρίαν λέγουσιν, ὅταν τις τὰ παρὰ τοῦ ἀπόντος εἰρημένα ἐκμαρτυρήσῃ.*[1] Harpocration draws his information from Demosthenes and Aeschines and defines *ekmartyria* thus: *διαφέρει τῆς μαρτυρίας, ὅτι ἡ μὲν μαρτυρία τῶν παρόντων ἐστὶν, ἡ δ' ἐκμαρτυρία τῶν ἀπόντων.* As he draws his information from the later orators he has in mind only written evidence, but others, like the *Lexica Segueriana*, may go back to the period of oral evidence.

The rhetoricians paid considerable attention to the grounds upon which the credibility of witnesses might be attacked.[2] Various grounds for suspicion are urged in the orators. A client of Isocrates, after showing that his opponent was convicted of falsehood in open court on a former occasion, pertinently inquires: "Who is more likely to produce a witness of what never happened than my opponent who himself had the effrontery to give false testimony for others?"[3] Wealthy men were under suspicion of securing testimony in their favor as well as other advantages in litigation. Demosthenes[4] makes a thinly veiled suggestion to this effect in his speech against Midias. A stronger statement is found in another speech in the Demosthenic corpus.[5] Friendship or enmity for either party may render the evidence of a witness subject to suspicion.[6] Relationship of a witness to a litigant might be used in an attempt to discredit testimony. Naturally, however, in family matters relatives were the very best witnesses. In fact, failure to produce them might in some circumstances be used against a litigant.[7] A general reputation in the community for untruthfulness exposed a witness to attack.[8] One of the most effective ways of discrediting a witness was to

[1] *Lex. Seg.*, p. 248.

[2] Anaximenes in *op. cit.*, I, 48 ff.; Arist. *Rhet.* i. 15; Volkmann, *Die Rhetorik der Griechen und Römer*, pp. 186 ff.

[3] Isoc. xviii. 57.

[4] xxi. 112, 139.

[5] xliv. 3; cf. lvii. 52.

[6] Cf. Demos. xxix. 22–24; liv. 33.

[7] *Ibid.* xxx. 23; xl. 28; lii. 17.

[8] *Ibid.* xxxvii. 48; liv. 33; cf. Leisi, *op. cit.*, p. 11.

show that he had a financial interest in the suit.[1] Another exceedingly effective way of discrediting a witness was to show that he had had no opportunity of himself knowing what was contained in his affidavit. Such testimony was really hearsay evidence[2] and could be made a ground for a *δίκη ψευδομαρτυρίων*.

There is singularly little reference to the means at the disposal of a litigant to secure the attendance of witnesses in the various hearings of the case in which he is interested as plaintiff or defendant, whether it be a *diké* or a *graphé*. And yet it is obvious that no judicial system can function satisfactorily if witnesses cannot be obliged to appear in both criminal and civil cases. It may fairly be assumed that in a city like Athens, where men had more leisure than in modern states, one had no difficulty in securing witnesses on any occasion. The association of citizens with one another in demes, tribes, phratries, and clubs was likely to be very close compared with the conditions of life in a modern city.

On most occasions a man engaged in some transaction which might require proof in court would provide himself with reliable witnesses about whose attendance in court there could be little doubt.[3] In emergencies, however, a man had to trust to those present to give testimony in his behalf.[4] When a man called for witnesses in public in Athens there is little doubt that there would be volunteers enough and to spare.[5] It is reasonable to assume that under most circumstances a litigant would have no difficulty in securing adequate testimony without the help of the law. The difficulty would arise when a vital matter depended upon the testimony of one man who for some reason might be unwilling to testify. The earli-

[1] Demos. xl. 58.

[2] Isaeus vi. 53 ff.; Demos. xl. 59; xliv. 54; cf. *supra*, p. 130.

[3] Isaeus iii. 19: *ἴστε γὰρ πάντες ὡς ὅταν μὲν ἐπὶ προδήλους πράξεις ἴωμεν, ἃς δεῖ μετὰ μαρτύρων γενέσθαι, τοὺς οἰκειοτάτους καὶ οἷς ἂν τυγχάνωμεν χρώμενοι μάλιστα, τούτους παραλαμβάνειν εἰώθαμεν ἐπὶ τὰς πράξεις τὰς τοιαύτας.*

[4] Cf. Aristoph. *Clouds* 494–96. The speaker in Demos. lvii. 14 had to rely on hostile witnesses.

[5] Cf. Antiph. vi. 22 ff., where more than fifty men and boys were present when the fatal draught was administered.

est reference to an unwilling witness occurs in Isaeus,[1] where the speaker claims that one Hierocles was witness of a fatal assault but opines that he may be unwilling to give evidence "detrimental to a will he is producing. But for all that, summon Hierocles that he may give his evidence before the court or else swear to his ignorance of the fact [*ἵνα ἐναντίον τούτων μαρτυρήσῃ ἢ ἐξομόσηται*]."[2] Normally, no doubt, a witness already in court would either testify or take an oath in disclaimer. There was, so far as is known, no legal penalty for a false *ἐξωμοσία*. Nevertheless, many a man might well have shrunk from taking a false oath for the sake of his reputation.[3]

It was incumbent upon the litigant himself to notify his witnesses to be present at the arbitration or the trial. The state did not summon witnesses sub poena. There is no evidence that a litigant took care to be in a position to prove that he had duly notified his witnesses, but there is every likelihood that he did.[4] If the witness did not appear or refused to take the stand, what recourse had the litigant? Lycurgus[5] has an interesting section on witnesses.

> Before the witnesses take the stand, I wish to say a few words to you. You are not, I take it, unaware of the schemings of defendants or the entreaties of those trying to beg them off; but you well know that many witnesses for the sake of money or to win good-will have been persuaded either to be forgetful or to fail to appear or to find some other excuse for not testifying. Do you, therefore, require that witnesses take the stand without fear and that they do not attach more importance to gratitude than to you and the city, but pay the city their debt of truth and justice and not desert their post of duty, or touching the altar as the law requires take an oath of disclaimer. But if they take neither course, we shall, in the interest of you and the laws and the democracy, call them to account [*κλητεύσομεν*].

The faults for which the recalcitrant witness could be called to account were failure to appear or, if he appeared, failure either to testify or to take the oath in disclaimer.[6]

[1] ix. 18.

[2] The date of this speech is shortly after 371 B.C.; cf. Lipsius, *op. cit.*, p. 876, n. 41.

[3] Demos. xix. 176; xlvii. 70. [4] Cf. Lipsius, *op. cit.*, p. 881. [5] i. 20.

[6] In ten cases where the alternative was offered only three persons took the oath of disclaimer (cf. Leisi, *op. cit.*, p. 68).

The procedure involved in *κλήτευσις* is far from clear.[1] There are two passages that throw some light on the question. The plaintiff in *Apollodorus* v. *Stephanus et Neaera* says: "I shall call Hipparchus himself before you, and compel him to testify or take an oath of disclaimer according to law *ἢ κλητεύσω αὐτόν.*"[2] Aeschines adds another step to the process: *κάλει δέ μοι Ἀμύντορα τὸν Ἐρχιέα· καὶ ἐκκλήτευε, ἐὰν μὴ θέλῃ δευρὶ παρεῖναι.*[3] On the basis of these two passages one might assume with considerable confidence that when it became apparent that the witness refused to testify or failed to appear, the principal appealed to the court for redress. In some fashion there was judicial action, either by the presiding officer or by the dicasts, but its nature is obscure.[4] The recalcitrant witness was fined one thousand drachmas.[5]

In the passage quoted above from Lycurgus[6] the jury is asked for assistance: *ἀξιοῦτε οὖν τοὺς μάρτυρας ἀναβαίνειν.* Similarly the plaintiff in *Epichares* v. *Theocrines*[7] makes a plea for help from the dicasts:

> Undoubtedly, men of the jury, Theocrines and his friends have tried all they could to tamper with the witnesses, and to induce them, either by threats or persuasion, not to give evidence. However, if you will support me as you ought to do, and command them, or rather join me in compelling them, either to depose or take the oath of disclaimer, and if you will not permit them to trifle with the court, the truth will be discovered.

But in neither of these passages is judicial action contemplated. The speaker is merely trying to put pressure upon the witness by these appeals to the dicasts. As individuals the dicasts might urge the witness to take the stand, just as they might express their annoyance at what a litigant might say.[8] A verdict of a dicastery could be reached only by a formal vote.

Judicial action by a magistrate or board could only take the

[1] Wyse, *op. cit.*, p. 638; the word *κλήτευσις* does not appear in the sources (cf. Lipsius, *op. cit.*, p. 880, n. 55).

[2] *Demos.* lix. 28.

[3] ii. 68.

[4] Cf. Lipsius, *op. cit.*, pp. 880–81.

[5] Aeschin. i. 46.

[6] i. 20.

[7] Demos. lviii. 7.

[8] Cf. Socrates' frequent appeals for an uninterrupted hearing (Plato *Apol.* 27B, 30C).

form of an ἐπιβολή. But the highest ἐπιβολή recorded is fifty drachmas. Besides, an ἐπιβολή was not imposed by a magistrate in court.[1] The fine of one thousand drachmas suggests a parallel with the infliction of a similar fine upon a litigant who failed to obtain at least one-fifth of the votes. In this instance no real judicial action was required. The presiding officer forthwith recorded the fine as soon as the count of the votes showed that the losing litigant was liable under the law.[2] In the case of a defaulting witness the procedure would be much the same, with two exceptions. Upon the request of the party the witness was solemnly called upon to take the stand (κλητεύειν). If he refused, the fine of one thousand drachmas was entered in the record. The proclamation of the fine (ἐκκλητεύειν) by the herald was an unusual feature, intended, no doubt, to impress the witnesses yet to be called. In case the witness was absent, the only difference would be that the defaulting witness could protest the fine if he could show good and sufficient cause for his absence. The intervention of the litigant was required not merely to initiate the punishment of the defaulting witness but possibly to give him an opportunity to choose between the fine and a δίκη λιπομαρτυρίου or a δίκη βλάβης, either of which might be instituted against a witness. It is quite unlikely that a suit for damages could be instituted if the witness had been fined.[3]

The chief source of our information regarding the δίκη λιπομαρτυρίου is a single case, *Apollodorus* v. *Timotheus*.[4] The plaintiff relied on one Antiphanes to prove an important point in his suit:

> He prevented me by a trick from putting a deposition in the box before the arbitrator; for he kept saying that he would give evidence for me by the day of giving the award; and when the day arrived, although he was summoned from his house, (for he was not to be seen,) he failed to attend as a witness at the instigation of the defendant.

The plaintiff then and there commenced proceedings against the defaulting witness before the arbitrator. The nature of

[1] Cf. *supra*, I, 282 f.

[2] Cf. *supra*, pp. 56 f.; Lipsius, *op. cit.*, pp. 449–50.

[3] Cf. Bonner, *op. cit.*, pp. 42–43; Leisi, *op. cit.*, p. 49.

[4] Demos. xlix. 19.

these proceedings is wholly obscure. Apollodorus deposited the fee (a drachma) *τοῦ λιπομαρτυρίου*. The arbitrator did not find against the witness. There is no indication as to what the arbitrator could have done to the witness if his finding had been adverse. As it was, he waited until evening of the final day and gave his decision in favor of Timotheus. The case was appealed and came before a court. Meanwhile, Apollodorus filed a *δίκη βλάβης* against Antiphanes before the decision of his suit against Timotheus.[1] Just what damages he had suffered beyond the adverse decision of the arbitrator, which could be reversed if the present action was successful, and the loss of the drachma it is hard to tell. Nevertheless, he proceeds to call Antiphanes to take the stand and give his testimony under oath.[2] In the present case Antiphanes is not called as a witness in the usual way, for no affidavit of his was in the hands of the clerk. A request (*ἀξιῶ*) was made that he take the stand and tell (*εἰπεῖν*) the dicasts under oath whether he had lent a certain sum of money to Timotheus. But at this time no oral evidence was permitted in a heliastic court; all must be in writing. Neither was it the practice for a litigant to swear his own witnesses. But there is no indication that Antiphanes ever did appear in court. The whole proceeding is without parallel in the orators. Leisi regards it as "eine durch die vorausgehende Erzählung entschuldigte ungesetzliche Massregel des Apollodor."[3] It is hard to believe that Apollodorus seriously proposes something contrary to law, namely, to present oral evidence in court.[4]

The question naturally arises whether the obligation to

[1] *Ibid.* 20: "And now I have commenced a private action for damage against Antiphanes, because he neither gave evidence nor took an oath of disclaimer according to law. And I require him to get up and say before you on his oath, first, whether he lent Timotheus a thousand drachmas in Calauria."

[2] This was an arbitration case, and evidence not submitted at the arbitration could not normally be introduced in a court trial. For a discussion of this feature of the case cf. *supra*, p. 100.

[3] *Op. cit.*, p. 54.

[4] It is useless to indulge in speculations such as those of Rentzsch, *De Δίκῃ Ψευδομαρτυρίων in jure Attico*, pp. 24 ff.; cf. Bonner, *op. cit.*, p. 56; Leisi, *op. cit.*, p. 53.

testify is a duty to the state or to the individual litigant.[1] The words already quoted from Lycurgus[2] show that he believed the duty was owed the state. But since as a rule offenders against the state were prosecuted by volunteers, the means of compelling the attendance of witnesses at a trial must be initiated by the prosecutors. Consequently, there was as a rule[3] no distinction made between witnesses in public suits and witnesses in private cases.

The lexicographers suppose that a *δίκη λιπομαρτυρίου* was allowed only when the witness had definitely promised to be present.[4] The theory has been advanced that the witness by his promise entered into a contract. The failure to testify upon due notification of the time and the place of the hearing constituted the basis of the *δίκη λιπομαρτυρίου*.[5] But the decisive objection to this theory of a contract is the fact that friends, relatives, and other unwilling witnesses were compelled to take the stand or take an oath in disclaimer. In *Aphobus* v. *Phanus*[6] it is said that Aphobus had been forced in a previous case to give testimony against his uncle Demon. A better example occurs in the same speech where Aesius took

[1] Leisi, *op. cit.*, p. 38.

[2] i. 20, quoted *supra*, p. 137: *ὑπὲρ ὑμῶν καὶ τῶν νόμων καὶ τῆς δημοκρατίας κλητεύσομεν αὐτούς*. Photius (*s.v.* *λειπομαρτύριον*) describes failure to testify as an *ἀδίκημα ἐφ' ᾧ γραφὴ ἦν, εἴτις ἐκλείποι μαρτυρίαν*. His further statement that *κλήτευσις* was a form of *graphé* has some justification in the fact that the defaulting witness was fined.

[3] Cf. *supra*, pp. 25 ff., for appointed prosecutors.

[4] Pollux viii. 36: *λιπομαρτυρίου δὲ (δίκη) κατὰ τῶν ἰδόντων μὲν καὶ μαρτυρήσειν ὁμολογησάντων, ἐν δὲ τῷ καιρῷ τὴν μαρτυρίαν ἐκλιπόντων*. Cf. Photius, *s.v.* *λειπομαρτύριον*.

[5] Rentzsch (*op. cit.*, pp. 20 ff.) maintains that the agreement need not have been consummated in the presence of witnesses, citing as proof the words of Hyperides iii. 13: *ὡς ὁ νόμος λέγει, ὅσα ἂν ἕτερος ἑτέρῳ ὁμολογήσῃ κύρια εἶναι*. Leisi (*op. cit.*, p. 51) takes exception and maintains that witnesses were required to be present at the summons of witnesses. He finds the proof of this view in Demos. xlii. 12: *κυρίας εἶναι τὰς πρὸς ἀλλήλους ὁμολογίας, ἃς ἂν ἐναντίον ποιήσωνται μαρτύρων*. The reason that the arbitrator did not give judgment against Antiphanes was that there were no witnesses of his promise to testify. Lipsius (*op. cit.*, pp. 784–85) believes that Apollodorus' failure to notify Antiphanes duly until the last session (*κυρία*) was the cause.

[6] Demos. xxix. 19–20.

the stand against his brother Aphobus because he wished *οὔτ' ἐπιορκεῖν οὔτ' εὐθὺς παραχρῆμα δίκην ὀφλισκάνειν.*[1] It is beyond belief that Aphobus and Aesius ever promised to give testimony which they finally gave reluctantly. It follows inevitably that a citizen upon due notification was obliged by law to give evidence or take an oath of disclaimer. In the absence of any indication in the sources of the nature of a legal notification it may safely be assumed that the principal must in case of necessity be in a position to prove that the witness had been duly summoned. In *Apollodorus* v. *Antiphanes*[2] it would appear that Apollodorus, relying upon the frequent promises (*φάσκων ἀεί μοι μαρτυρήσειν εἰς τὴν κυρίαν*) of Antiphanes to be on hand at the final session before the arbitrator, did not summon him legally. In the meantime, so it was alleged, Timotheus had tampered with Antiphanes with the result that he did not appear as he had promised even on the last day of the arbitration. By that time it was no longer possible to take the proper steps.

There are some significant differences between *κλήτευσις* and *δίκη λιπομαρτυρίου*. The former carries a fine payable to the treasury and so may be regarded as a means of punishing a citizen who fails in his duty to the state by not testifying when called upon to do so. There is no trial to impose the penalty. The court at the instance of the principal simply takes judicial notice of a self-evident fact and records the fine. The litigant who has suffered by the default of his witness receives no redress. If he wishes to recover damages he must file a *δίκη λιπομαρτυρίου* and take his chances of winning his case and securing adequate damages.[3] So far as our sources go it is clear that *κλήτευσις* was preferred in public suits. Of the seven cases in which *κλητεύειν* is mentioned or im-

[1] *Ibid.* 15; the *diké* contemplated was undoubtedly a *δίκη λιπομαρτυρίου.*

[2] *Ibid.* xlix. 19.

[3] The *δίκη λιπομαρτυρίου* was *τιμητός*; cf. Lipsius, *op. cit.*, pp. 785 and 878 ff., whose conservative remarks about the nature and effect of this rather obscure process are preferable to the speculations of Rentzsch, *op. cit.*, p. 22.

plied,[1] only one was a private suit.[2] This is what might be expected, for in a public case the prosecutor could only rarely suffer such financial loss as he would in a private suit. Normally he would let the law take its course. In a private suit *κλήτευσις* was a simple and safe means of revenge, but it carried no damages for the litigant. If he wanted to recoup his losses he must resort to a *δίκη λιπομαρτυρίου* or a *δίκη βλάβης*. One difference between these two is that the latter could not be instituted until the conclusion of the case. The only extant case is *Apollodorus* v. *Antiphanes*.[3] Here, upon Antiphanes' refusal to testify before the arbitrator, Apollodorus at once entered a *δίκη λιπομαρτυρίου*. If he had won, Antiphanes would in all probability have been obliged to testify or to pay estimated damages. As Apollodorus did not win, there was no way in which he could bring the vital testimony of Antiphanes before the court, because in arbitration cases only evidence filed before the arbitrator could be used on appeal. He could, however, bring a *δίκη λιπομαρτυρίου* before the decision of the appeal because the damage had already been done before the arbitrator.

The ground for a *δίκη βλάβης* was in all probability not a contract. The reasons for reaching this conclusion are not as good as one would wish. The analogy of the *δίκη βλάβης* with the *δίκη λιπομαρτυρίου* where no promise was required and the inference which may be drawn from the law proposed by Plato[4] have been regarded as sufficient grounds for the view that no contract was required.[5] If, as has been pointed out before, it was a duty of the citizen to go to court as a witness when properly summoned, the liability of the witness if he failed was *ex delicto*, not *ex contractu*.

On the basis of a passage in *Aphobus* v. *Phanus*, it has been

[1] Aeschin. i. 46; ii. 68; Demos. xix. 176, 198; xxxii. 30; lviii. 7, 42; lix. 28; Lycurg. i. 20.

[2] Demos. xxxii.

[3] *Ibid.* xlix. 19.

[4] *Laws* xi. 937A: *ὁ δ' εἰς μαρτυρίαν κληθείς, μὴ ἀπαντῶν δὲ τῷ καλεσαμένῳ, τῆς βλάβης ὑπόδικος ἔστω κατὰ νόμον.*

[5] Lipsius, *op. cit.*, p. 879. On p. 659 Lipsius takes the view that a *δίκη βλάβης* did not lie unless the witness had promised to testify.

argued that if a litigant by having false testimony read before a court rendered the witness liable to a *δίκη ψευδομαρτυρίων*, he was himself liable to a suit for damages.[1] Leisi cautiously remarks: "wenn wir uns auf Dem. xxix. 16 verlassen dürfen." This caution is very commendable. For the speaker says:

> In the first place, if he really never gave this testimony, he would have denied it, not now for the first time, but immediately upon its being read in court, when denial would better have served his purpose. In the next place, if I had without cause exposed him to a suit for giving false testimony against his brother, (a charge, on which men run the risk of degradation, besides pecuniary penalties,) he would not have let the matter rest, but would have brought an action against me for damage.

Since the law required the witness to be present to acknowledge the testimony purporting to come from him or to take an oath of disclaimer,[2] there was no possibility that an affidavit could be introduced without the knowledge and consent of the witness. The speaker in *Aphobus* v. *Phanus* was indulging in a bit of rhetoric, hoping that a proportion of the dicasts would be suitably impressed.

[1] Demos. xxix. 16; Leisi, *op. cit.*, p. 52; Lipsius, *op. cit.*, p. 659.

[2] Meier-Schömann-Lipsius, *op. cit.*, p. 495, n. 55; Lipsius, *op. cit.*, p. 882.

CHAPTER VII

OATHS

In origin the oath was religious, and it long preceded any idea of the formal administration of justice. Early in the history of mankind when a man's word was distrusted by his fellow-man he cast the burden of proof on higher powers and called upon the gods for assistance. The oath then was an attempt to win credence for a statement or to render a promise binding by calling the gods to witness when a simple, unsupported assertion was no longer sufficient.[1] In a primitive state of society as long as men stood in complete awe of the gods an oath in the name of the gods would have proved sufficient, for few men would have tempted Providence by swearing a false oath. But that perjury was very early practiced cannot be denied. "The Greeks especially were so prone to deceit that nothing short of very strong inculcations of the sanctity of an oath would insure its being kept."[2] In time the wording of the oath tended to become formularized and the gods who were to be called to witness were specified.[3] So that beside the informal oath there were developed fixed formulas for formal oaths for certain occasions.[4] The curse was regularly added, in which the gods were asked to send punishment upon the man who, having called the gods to witness,

[1] Cf. Hirzel, *Der Eid*, p. 2; for the place of Horkos (ὅρκος) in Greek mythology cf. Hesiod *Works and Days* 219, 804; *Theogony* 226 ff.; Stobaeus *Ecl.* i. 41, p. 978; for discussions of the etymology cf. Herodian ii. 1, p. 287. 22 (Lentz); Eustathius *Il.* ii. 338; Walde-Pokorny, *Vergl. Wörtbch. d. indoger. Sprache*, II, 502.

[2] Paley on Hesiod *Theog.* 231. The philosophers were interested in the oath and in perjury and its consequences: cf. Plato *Laws* 948B and Chrysippus in Stobaeus *Flor.* xxviii. 15 (Meineke, I, 356); cf. also Bentham's opinion of the inefficiency of oaths, quoted by Kennedy, *Demos.*, IV, 395 ff.

[3] Cf. *Il.* iii. 275 ff.; xv. 36 ff.; *Od.* v. 184 ff.

[4] For a picture of the development of the oath cf. Ott, *Beiträge zur Kenntniss des griechischen Eides*, pp. 10 f. Ott takes no account of informal oaths which must always have been a feature of the daily life of the Greeks.

then made a false statement or a promise which he did not fulfil.

According as oaths refer to future or to past time they are commonly classified as "promissory" and "evidentiary." The promissory oath is a promise on the part of the person who takes it that something either will or will not happen, at least as far as the matter lies within his power. The evidentiary oath is a statement that something either has or has not happened. This distinction is made by some late authors, and indeed it is a very convenient one in the discussion of different kinds of oaths.[1] But this classification fails to take account of all the oaths which occur in the fully developed Athenian legal system of the fifth and fourth centuries. The promissory oath appears frequently in various forms, as, for example, the oaths of officials and jurors. The evidentiary oath includes two varieties of oath. The first is the real evidentiary oath, which is a form of wager and which was used to settle a dispute with absolute finality. This oath was used as a form of trial in primitive attempts at the administration of justice. Trial by evidentiary oath is the result of a challenge and consists in tendering to an opponent an oath embodying his contentions, or in offering to take an oath embodying one's own contentions.[2] It is the same sort of at-

[1] Earlier writers seem not to have been interested in such a differentiation although there are many references to the oath in theory and in practice. Plato includes oaths among the *ὁμολογίαι* (*Rep.* 443A). Hirzel (*Der Eid*, p. 4), after a survey of the way in which different writers deal with the oath, concludes that in general the ancients thought of the oaths as promissory, although they at times in effect recognized the evidentiary oath as did Nicostratus, who gives as examples of oaths *νὴ τὴν Ἀθηνᾶν ἔπραξα τάδε, οὐ μὰ τὴν Ἀθηνᾶν οὐκ ἔπραξα* (Schol. on Arist., pp. 87B 30 ff. [Brandis]). Cf. also Stobaeus *Flor.* xxviii. 15 (Meineke, I, 356) in a discussion of Chrysippus' distinction between *ἀληθορκεῖν* and *εὐορκεῖν* and between *ἐπιορκεῖν* and *ψευδορκεῖν*. The classification into promissory and evidentiary oaths is the common one, although Ziebarth (*De iureiurando in iure Graeco quaestiones*, p. 42) suggests another division into the voluntary oath taken by agreement of the two parties to a suit and the obligatory oath which is prescribed by law. This division, however, takes account only of oaths which occur in legal actions. The first division here is evidentiary and so corresponds to Hirzel's first division. But the obligatory oath may or may not be evidentiary and so does not correspond to Hirzel's second division.

[2] Cf. *supra*, I, 27.

tempt to get the gods to settle a question which we find in the various forms of ordeal. Glotz[1] points out this similarity between the oath and ordeal: both put the matter of punishment upon the gods. But in ordeal the false person is punished upon the spot while in the oath the gods may postpone punishment so that it falls even upon descendants of the false swearer.[2] Sometimes the two are found together. In the *Antigone*[3] the messenger offers to undergo ordeal by fire and to swear to the truth of his story. It is not surprising that the members of a primitive society were willing to accept an oath in the name of the gods as final and as constituting a whole trial. In this oath, just as in the promissory oath, the curse was often an important part.

If we follow the course of Greek literature we find that the Greeks recognized the evidentiary oath long after it ceased to play an important part as a form of trial.[4] So in Theognis there are several references to the false evidentiary oath. One such reference in regard to a deposit of property occurs in a characteristic passage in which Theognis deals with one of his favorite topics, the late punishment of the wicked.[5] A passage in Herodotus[6] is reminiscent of this passage of Theognis. Glaucus, a Spartan who was famous for his honesty, had taken a deposit of money with suitable tokens. But later, when the sons of the depositor came to collect the deposit, he pretended to have no memory of the transaction although they produced their tokens. He told them to return later and promised that if he then had no recollection of the matter he would take an oath that he had not received the deposit.[7] That he was somewhat worried over his act is indicated by the fact that he went to Delphi to inquire of the oracle whether or not he should take an oath and thus be enabled

[1] *L'Ordalie dans la Grèce primitive*, p. 123; cf. Latte, *Heiliges Recht*, p. 6.

[2] Cf. Glotz, *op. cit.*, p. 119. [3] 264 f.

[4] For the early history of the evidentiary oath cf. *supra*, I, 27 ff., 49 ff. For two cases of the evidentiary oath cf. the Gortyn Code ii. 11 ff.; iii. 1 ff., in Buck, *Greek Dialects;* cf. Headlam, *JHS*, XIII, 65; Bücheler and Zitelmann, "Das Recht von Gortyn," *Rhein. Mus. XL, Ergänzungsheft*, pp. 105–7.

[5] 199 ff., 1139 ff., 283 ff. [6] vi. 86. [7] vi. 86 β 2 and γ 1.

to keep the money. His denunciation by the priestess for such a contemplated oath, with her promise of evil to come upon the perjurer, had such an effect on Glaucus that he was deterred from taking an oath. He restored the money, but the god was not done with him; his family disappeared utterly from Sparta. If Glaucus had gone through with the oath with the consent of the sons of the depositor, it is to be assumed that it would have settled the case, for Glaucus undoubtedly believed that if he took the oath the money would be left in his possession. Another passage occurs in Herodotus[1] in one of those curious stories which deal with a hero or a god who appeared to a woman in her husband's form and became in this guise the father of her child. The wife of Ariston swore to him that it was he who had lain with her the preceding night. The very fact that she was willing to swear to the matter persuaded him of her good faith, and he immediately perceived that it had been a divine appearance.

Aeschylus gives us a further example of an evidentiary oath. In this case it is a challenge to an oath which is refused.[2] The Erinyes complain that Orestes will neither take an oath as to his innocence of the crime of matricide nor will he tender to them an oath as to his guilt. Orestes manifestly cannot swear to his innocence of the actual crime of killing, for his plea is justifiable homicide.[3]

Alongside the real evidentiary oath there developed an oath in support of testimony which for convenience may be termed the "confirmatory" oath. This oath might be taken either by a litigant or by a witness. In many cases this oath was not prescribed by law but could be demanded.

In the following discussion we shall see how promissory, evidentiary, and confirmatory oaths developed and were used in different phases of Athenian government and administration of justice in the fifth and fourth centuries. The oath plays a great part in Attic oratory. It is sometimes a rhetori-

[1] vi. 68 f. [2] *Eumenides* 429 ff.

[3] In general, the commentators on this passage view the oaths as corresponding to the oaths of the parties at the *anakrisis* (cf. Sidgwick, Blaydes, Blass, *ad loc.*). Verrall (*ad loc.*) identifies it with the ancient purgatory oath.

cal device to strengthen a statement or to impress something upon the dicasts. The various formulas of such oaths have been extensively studied and also their artistic use.[1] There are also frequent references to the different oaths which occur in the course of a trial, such as the heliastic oath, the oaths of magistrates, the party oaths, the oaths in homicide. It is with the oaths as they occur in the orators that we are chiefly concerned. There are, however, certain passages in other authors and in inscriptions which indicate the importance of the oath in public life generally in Athens.

The curse is an important feature of the oath. Apparently the feeling was that the stronger the curse was made, so much more likely was the oath-taker to keep his oath. The curse occurs in many oaths which were required by law, and also in many incidental oaths.[2] The purport is always the same: utter destruction for the swearer and his house if he swears a false oath, many blessings for him if his oath is good.

Naturally, the promissory oath occurs in all sorts of forms in public life. There are abundant examples of treaties and public agreements which involve oaths.[3] In general the oaths which appear in such agreements contain vows of both parties to the agreement to observe certain specified conditions. Such an oath is contained in the Chalcidian decree of 446 B.C. in which the adult male Chalcidians are ordered to swear allegiance to Athens while the *bouleutai* and dicasts of Athens swear in behalf of the Athenian state to uphold certain rights of the Chalcidians which are specified in the decree.[4] The

[1] An extensive collection of the oaths in the orators has been made by Ott, *op. cit.*, pp. 39 ff. Cf. Kühnlein, *De vi et usu precandi et jurandi formularum apud decem oratores Atticos;* Blass, *Att. Bered.*, III², 384, under *Schwurformeln;* Ziebarth, *op. cit.*, pp. 10 ff.; Hofmann, *De iurandi apud Athenienses formulis.*

[2] For the formula of such a curse cf. the curse quoted in the heliastic oath (Demos. xxiv. 149; cf. also liv. 41).

[3] For a list of treaties and agreements in which oaths were involved cf. Ott, *op. cit.*, pp. 76 ff.

[4] *IG*², I, 39; Hicks and Hill, *Greek Historical Inscriptions*, 40; Tod, *Greek Historical Inscriptions*, 42; cf. *supra*, I, 214, for the reason why the oath was sworn by the *bouleutai* and the dicasts. These two groups must here represent the whole people.

exact wording of the two oaths is given *in toto* in the decree.[1]

There are some occasional public oaths which are of the promissory type. For instance, in the decree of Demophantus, founded on a law of Solon and passed in 410 B.C. after the battle of Cyzicus, all Athenians are ordered to swear to rid the state of would-be subverters of democracy. The oath is to be taken both in the ecclesia and in the deme assemblies, apparently with the purpose of having as many as possible of the Athenians swear.[2] This decree was occasioned by the revolt of the Four Hundred. The oath was not repeated annually or at any stated periods, although there was a renewal of it after the overthrow of the Thirty in 403 B.C.[3] But that it was considered to continue in force is shown by Lycurgus in his oration against Leocrates[4] and by Demosthenes in his speech against Leptines[5] in which the jury is reminded of the decree of Demophantus.

Magistrates took an oath on entering upon office. Although they differed in details, these oaths had to do for the most part with promises to perform the duties of the office in accordance with the laws and with promises to refuse bribes. All of them were definitely of the promissory type. For instance, Aristotle[6] gives the oath of the archons. After the *dokimasia* the archons went to the oath stone and swore as follows: *δικαίως ἄρξειν καὶ κατὰ τοὺς νόμους, καὶ δῶρα μὴ*

[1] Another good example of an agreement between states is the one hundred years' treaty, of which Thucydides gives us the text (v. 47. 8), between the Athenians and their allies on the one hand and the Argives, Eleans, Mantineans, and their allies on the other hand. The treaty elaborately specifies the conditions which are to be observed on both sides and then gives the wording of the oath, listing the officials and governing bodies who are to take the oath for each state. It is a very solemn oath over a sacrifice, and the participants are each to swear the oath that is most binding in his own country (*ὀμνύντων δὲ τὸν ἐπιχώριον ὅρκον ἕκαστοι τὸν μέγιστον κατὰ ἱερῶν τελείων*). This means that each country involved is to use its own formulas and is to call to witness the gods customarily invoked in such oaths in that particular country, but the promise is to be the same in all cases: *ἐμμενῶ τῇ ξυμμαχίᾳ κατὰ τὰ ξυγκείμενα δικαίως καὶ ἀβλαβῶς καὶ ἀδόλως, καὶ οὐ παραβήσομαι τέχνῃ οὐδὲ μηχανῇ οὐδεμιᾷ.* Cf. Kennedy, *op. cit.*, IV, 393.

[2] Andoc. i. 96 ff.; for comments on the phraseology of the decree cf. *supra*, I, 214.

[3] Cf. Lycurg. i. 124 f. [4] i. 127. [5] xx. 159. [6] *Ath. Pol.* lv. 5.

λήψεσθαι τῆς ἀρχῆς ἕνεκα, κἄν τι λάβωσιν ἀνδριάντα ἀναθήσειν χρυσοῦν. Afterward they had to go to the Acropolis and there swear the same oath, after which they entered upon their terms of office. On the basis of the passage in Lycurgus,[1] Gilbert assumes[2] that all Athenian officials had to take an oath before entering on their office, and this was undoubtedly the case, although it is impossible to reconstruct the oath in each instance.

Just as the magistrates swore to uphold the laws, so some of the governing and judicial bodies were required to take the oath before entering upon their duties. The oath of the *bouleutai* goes back to the time of Cleisthenes.[3] Aristotle says that the same oath still existed in his own day. Again this oath, like that of the magistrates, had to do chiefly with a promise to perform the duties of the office in the best interests of the city.[4] But another clause of the oath found in Demosthenes refers to the judicial activities of the boulé. The *bouleutai* swore not to imprison a man who produced the proper bail, except under certain conditions, i.e., treason or conspiracy for overthrow of the government.[5] This provision is wrongly attributed to Solon. Other provisions of the oath were to the effect that they would keep the laws of Solon, that they would give the best advice to the Athenians,[6] that they would reject at the *dokimasia* of the next boulé those who were not worthy to be members.[7] This is the annual oath of the *bouleutai* which they swore just as magistrates did on

[1] i. 79. [2] *Const. Antiqu.*, p. 221.

[3] Cf. Arist. *Ath. Pol.* xxii. 2. For a discussion of the introduction of this oath cf. *supra*, I, 200, 204, and 342.

[4] Xen. *Mem.* i. 1. 18; Lysias xxxi. 1; Demos. lix. 4.

[5] Demos. xxiv. 144, 148.

[6] For the curse which was pronounced by a herald at meetings of the ecclesia and boulé against those who wilfully deceived the people or wronged them in any way cf. Demos. xviii. 282; xix. 70; xxiii. 97; Aeschin. i. 23; Din. i. 46–47. For a comic curse of this sort cf. Aristoph. *Thesmo.* 295–311, 331–50.

[7] Xen. *Mem.* i. 1. 18; Demos. lix. 4; Lysias xxxi. 1–2; Plut. *Solon* xxv. 3.

coming into office.[1] That the *bouleutai* joined in occasional oaths is evident from such oaths as were sworn in the Chalcidian decree where they with the dicasts represented the whole Athenian people. It is the same negative type of oath which is mentioned above, i.e., not to imprison a man except under certain conditions.

Before entering on their duties the members of the Heliaea took an oath which is designated as *ὁ τῶν ἡλιαστῶν ὅρκος* or *ὁ ἡλιαστικὸς ὅρκος*.[2] Naturally a great deal is heard about this oath in the orators, for the speaker frequently calls upon the dicasts to remember their oath and warns them of the danger of perjury. Often some phrase from the oath is quoted, such as *πείσεσθαι τοῖς νόμοις καὶ τοῖς τοῦ δήμου ψηφίσμασι*[3] or *ἢ μὴν ὁμοίως ἀκροάσεσθαι τῶν κατηγορούντων καὶ τῶν ἀπολογουμένων*.[4] This oath was taken annually by the whole body of heliasts[5] and is, like the oath of officials generally, a promissory oath.[6] The formula, or what purports to be the formula,

[1] We hear of an addition to the bouleutic oath in 410 B.C.: *φησὶ γὰρ Φιλόχορος ἐπὶ Γλαυκίππου καὶ ἡ βουλὴ κατὰ γράμμα τότε πρῶτον ἐκαθέζετο καὶ ἔτι νῦν ὀμνῦσιν ἀπ' ἐκείνου καθεδεῖσθαι ἐν τῷ γράμματι, ᾧ ἂν λάχωσι* (Schol. on Aristoph. *Plut.* 972; cf. Gilbert, *Beiträge zur innern Geschichte Athens*, pp. 348 ff.). According to Gilbert, the reference is to assignment of places in the boulé. The evidence is not very good, but this seems to be a plausible explanation. For an addition made after the amnesty of 403 B.C. cf. *infra*, p. 154, n. 4.

[2] Demos. xxiv. 149; Hyper. iv. 40; cf. *supra*, I, 155.

[3] Din. i. 84.

[4] Isoc. xv. 21. For a collection of phrases which purport to be from the heliastic oath cf. Ott, *op. cit.*, pp. 60 ff. Ott classifies all the passages in which the dicasts are reminded of the heliastic oath according to tone and phraseology.

[5] Isoc. xv. 21. It is likely that the oath dates from the time of Solon; cf. *supra*, I, 162.

[6] The practice of swearing judges is very old. In speaking of the heroic kingship Aristotle (*Pol.* 1285B) mentions the fact that as judges the kings sometimes were sworn: *καὶ πρὸς τούτοις τὰς δίκας ἔκρινον. τοῦτο δ' ἐποίουν οἱ μὲν οὐκ ὀμνύοντες, οἱ δ' ὀμνύοντες· ὁ δ' ὅρκος ἦν τοῦ σκήπτρου ἐπανάστασις.* With this may be compared the provisions of the Gortyn Code that in certain cases the judge shall give his decision under oath (i. 14, 24, 36; ii. 55; v. 45). In each of these cases we are dealing with the oath of an arbitrator. Ziebarth, in Pauly-Wissowa, *s.v.* "Eid," rightly differentiates the judicial oath from that of an official. The judicial oath has a higher meaning. The judge is asking for divine aid in making his decision in case there is not enough evidence to make the matter clear otherwise.

of this oath is preserved by Demosthenes[1] in his speech against Timocrates:

Ψηφιοῦμαι κατὰ τοὺς νόμους καὶ τὰ ψηφίσματα τοῦ δήμου τοῦ Ἀθηναίων καὶ τῆς βουλῆς τῶν πεντακοσίων. καὶ τύραννον οὐ ψηφιοῦμαι εἶναι οὐδ' ὀλιγαρχίαν· οὐδ' ἐάν τις καταλύῃ τὸν δῆμον τὸν Ἀθηναίων ἢ λέγῃ ἢ ἐπιψηφίζῃ παρὰ ταῦτα, οὐ πείσομαι· οὐδὲ τῶν χρεῶν τῶν ἰδίων ἀποκοπὰς οὐδὲ γῆς ἀναδασμὸν τῆς Ἀθηναίων οὐδ' οἰκιῶν· οὐδὲ τοὺς φεύγοντας κατάξω, οὐδὲ ὧν θάνατος κατέγνωσται, οὐδὲ τοὺς μένοντας ἐξελῶ παρὰ τοὺς νόμους τοὺς κειμένους καὶ τὰ ψηφίσματα τοῦ δήμου τοῦ Ἀθηναίων καὶ τῆς βουλῆς οὔτ' αὐτὸς ἐγὼ οὔτ' ἄλλον οὐδένα ἐάσω. οὐδ' ἀρχὴν καταστήσω ὥστ' ἄρχειν ὑπεύθυνον ὄντα ἑτέρας ἀρχῆς, καὶ τῶν ἐννέα ἀρχόντων καὶ τοῦ ἱερομνήμονος καὶ ὅσοι μετὰ τῶν ἐννέα ἀρχόντων κυαμεύονται ταύτῃ τῇ ἡμέρᾳ, καὶ κήρυκος καὶ πρεσβείας καὶ συνέδρων· οὐδὲ δὶς τὴν αὐτὴν ἀρχὴν τὸν αὐτὸν ἄνδρα, οὐδὲ δύο ἀρχὰς ἄρξαι τὸν αὐτὸν ἐν τῷ αὐτῷ ἐνιαυτῷ. οὐδὲ δῶρα δέξομαι τῆς ἡλιάσεως ἕνεκα οὔτ' αὐτὸς ἐγὼ οὔτ' ἄλλος ἐμοὶ οὔτ' ἄλλη εἰδότος ἐμοῦ, οὔτε τέχνῃ οὔτε μηχανῇ οὐδεμιᾷ. καὶ γέγονα οὐκ ἔλαττον ἢ τριάκοντα ἔτη. καὶ ἀκροάσομαι τοῦ τε κατηγόρου καὶ τοῦ ἀπολογουμένου ὁμοίως ἀμφοῖν, καὶ διαψηφιοῦμαι περὶ αὐτοῦ οὗ ἂν ἡ δίωξις ᾖ. ἐπομνύναι Δία, Ποσειδῶ,[2] Δήμητρα, καὶ ἐπαρᾶσθαι ἐξώλειαν ἑαυτῷ καὶ οἰκίᾳ τῇ ἑαυτοῦ, εἴ τι τούτων παραβαίνοι, εὐορκοῦντι δὲ πολλὰ κἀγαθὰ εἶναι.

From this passage many attempts have been made to reconstruct the heliastic oath, and the general tendency is to discard the greater part of the oath as it stands in Demosthenes as the work of later writers and lexicographers who put together material found in the orators and elsewhere. Fränkel[3] reconstructs the oath on the basis of the work of Westermann.[4] He keeps the first sentence as given in Demosthenes, but adds to it two phrases, *περὶ δ' ὧν ἂν νόμοι μὴ ὦσι γνώμῃ τῇ δικαιοτάτῃ* and *καὶ οὔτε χάριτος ἕνεκ' οὔτ' ἔχθρας*, both from Demosthenes.[5] After rejecting the succeeding portion of the oath (*καὶ τύραννον . . . . τριάκοντα ἔτη*), he continues with

[1] xxiv. 149–51.

[2] Ποσειδῶ is undoubtedly a mistake. The god to be mentioned in this trinity should be Apollo; cf. Pollux viii. 122; Lipsius, *Das Attische Recht*, p. 153, n. 56; Fränkel, *Hermes*, XIII, 459 ff.

[3] *Op. cit.*, pp. 452 ff.

[4] *Commentationes de iurisiurandi iudicum Atheniensium formula.* Ott (*op. cit.*, pp. 98 ff.) follows Westermann. Hofmann (*op. cit.*, pp. 1–28), on the other hand, attempts a defense of the oath and accepts most of it. He is followed by Drerup, *Jahrb. f. cl. Phil.*, Supplbd. XXIV, 256 ff.

[5] xx. 118; xxiii. 96; xxxix. 39 ff.; lvii. 63.

the concluding passage in Demosthenes, that is, the promise to vote on the matter at issue and to listen impartially to both defendant and prosecutor, although he somewhat modifies the phraseology found in Demosthenes. He keeps also the curse, again deviating slightly from the words of Demosthenes.

Gilbert[1] follows Fränkel, but Lipsius[2] rejects the phrase *καὶ οὔτε χάριτος ἕνεκ' οὔτ' ἔχθρας* but rightly accepts the section on bribery from the Demosthenic passage *οὐδὲ δῶρα δέξομαι κ.τ.λ.*[3] He keeps the curse as it stands in Demosthenes. Lipsius does not claim that his reconstruction represents necessarily the exact wording of the oath, but he thinks the oath in all its essentials is there. The rejected portions are easily explained. Either they are repetitions in detail of the general promise to obey the laws or they consist of material which at some time for a brief period was part of the heliastic oath. For example, the passage with regard to the overthrow of the democracy is reminiscent of the addition which was made to the heliastic oath after the amnesty of 403 B.C. This oath is reported by Andocides: *καὶ οὐ μνησικακήσω, οὐδὲ ἄλλῳ πείσομαι, ψηφιοῦμαι δὲ κατὰ τοὺς κειμένους νόμους,*[4] but it does not occur in the oath as reported by Demosthenes. Drerup[5] believes that the parts of the oath dealing with the overthrow of the democracy and the amnesty probably belonged to the period of 410 or 403 B.C. and that the oath retained this formula year after year to keep alive in the jurors the consciousness of their duty to guard against subverters of the democracy and to preserve to the people their freedom. The

[1] *Beiträge*, p. 392. [2] *Op. cit.*, p. 152.

[3] For a similar provision in an oath in a Cnidian inscription cf. Dareste-Haussoulier-Reinach, *Recueil des inscriptions juridiques grecques* (1895), I, 170.

[4] i. 91. The passage contains two other oaths. The *bouleutai* swore: *καὶ οὐ δέξομαι ἔνδειξιν οὐδὲ ἀπαγωγὴν ἕνεκα τῶν πρότερον γεγενημένων, πλὴν τῶν φυγόντων.* And all Athenians were to swear: *καὶ οὐ μνησικακήσω τῶν πολιτῶν οὐδενὶ πλὴν τῶν τριάκοντα καὶ τῶν ἕνδεκα (καὶ τῶν δέκα)· οὐδὲ τούτων ὃς ἂν ἐθέλῃ εὐθύνας διδόναι τῆς ἀρχῆς ἧς ἦρξεν.* It may be assumed that these clauses would have some meaning for perhaps a generation or as long as there were survivors from the regime of the Thirty. After that they would cease to have point and would be dropped.

[5] *Op. cit.*, p. 261.

phrase *οὐ μνησικακήσω κ.τ.λ.*, which would not be of any importance after, at the most, one generation, was dropped. In the same way Drerup retains the phrase *καὶ τύραννον, κ.τ.λ.* It would continue to bind the judges to protect the democratic constitution. Drerup considers appropriate too the clause dealing with officials, since on the proper choosing and examination of officials depends the preservation of the existing constitution. Drerup, like all the others, rejects the age-qualification clause *καὶ γέγονα οὐκ ἔλαττον ἢ τριάκοντα ἔτη* as having no place in the midst of the duties of the heliasts.

It is certain that the passage in Demosthenes by no means represents the heliastic oath as it was sworn in any one period, but that various details are included which would be found in the oath at every period: the promise to vote according to the laws and decrees of the Athenian people and the council of five hundred, the promise not to accept bribes, the promise to listen impartially to both sides of the case and to vote on the subject at issue,[1] the calling of the gods to witness, and the curse. In addition there are details which at some time in some form were introduced into the oath for a limited period. Here belong the provisions regarding tyranny and the overthrow of the government (especially appropriate in 410 and 403 B.C. but not long afterward), the return of exiles, distribution of property, and the *dokimasia* of officials. It is interesting to observe that these details are all in negative form. It is not necessary to believe that in any part of the passage the actual phraseology of the oath is preserved except that such a stereotyped clause as the first sentence may well have been part of the original form.[2]

[1] The MS reading is *διαψηφιοῦμαι*. A correction to *ἀεὶ ψηφιοῦμαι* has been suggested.

[2] For a detailed discussion of the Athenian jurors' attitude toward their oath cf. Cronin, *The Athenian Juror and His Oath* (University of Chicago, 1936), pp. 18 ff., who accepts Fränkel's reconstruction of the oath without comment. There were two parts to the oath: "I shall vote according to the laws and decrees but when laws do not exist I shall use my best judgment" and "I shall vote concerning those things which are at issue, but I shall listen impartially to both accusation and defense." In each part the second half is a qualification of the first half. Cronin believes that absolute conformance to the oath would have resulted in a severe type of justice, but that the jury having irresponsible power would consider that

The next question to be raised with regard to the jurors' oath is whether the annual oath taken by all members of the Heliaea was the only oath or whether another had to be taken at the beginning of each case by the panel of dicasts who sat on the case. Lipsius[1] thinks that the theory of an oath at the beginning of each case is based on mistaken evidence. And in fact there is no evidence for such an oath. On the contrary, the evidence of Isocrates is against such an oath: *περὶ ταύτης δύ' ὅρκους ὀμόσαντες δικάζετε, τὸν μέν, ὅνπερ ἐπὶ ταῖς ἄλλαις εἴθισθε, τὸν δ', ὃν ἐπὶ ταῖς συνθήκαις ἐποιήσασθε.*[2] This refers to the annual heliastic oath and to the amnesty oath. There are many other passages in which the jurors are reminded of their oaths. In fact, on occasion the oath was read to them before they cast their votes.[3]

According to Pollux[4] and Harpocration[5] the heliastic oath was sworn at least in early times near the Ilissus and beyond the stadium at a place called Ardettus, named after a hero who had reconciled the Athenians when they were engaged in civil war.

There was an oath in connection with the award of a public arbitrator. Incidental reference is made to this by Aristotle, who, in speaking of the oath which officials took after their *dokimasia*, states that they took their oath at the same oath stone at which the arbitrators swore before giving their award: *βαδίζουσι πρὸς τὸν λίθον ἐφ' οὗ τὰ τόμι' ἐστὶν ἐφ' οὗ καὶ οἱ διαιτηταὶ ὀμόσαντες ἀποφαίνονται τὰς διαίτας.*[6] This might have been either a promissory or a confirmatory oath. The fact that they swore it before delivering their verdict might lead one to suppose that it was promissory, to the effect that they will act to the best of their ability in accordance with the laws in rendering their decision. On the other hand it may mean that the decision had already been made be-

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the oath was not a strict set of rules so much as it was an ideal pattern designed to secure justice. They would therefore interpret it loosely. As long as justice was obtained the spirit of the oath was kept.

[1] *Op. cit.*, p. 153.

[2] xviii. 34.

[3] Lysias xiv. 47.

[4] viii. 122.

[5] *S.v.* *Ἀρδηττός.*

[6] *Ath. Pol.* lv. 5.

fore the oath was taken and that it confirmed the justice of their decision. On the whole the former seems to be the better explanation.[1] The award was always given in the official meeting place, and there is never reference to the retirement of the arbitrators to the oath stone to swear after reaching a decision and before delivering the award. If they had done so, obviously the award would have been delivered at the oath stone. The arbitrators must have taken the oath after being notified of the case by the Forty and before taking charge of the case. Harrell considers the oath another safeguard to assure a successful arbitration.[2]

Apparently private arbitrators were not required to take an oath. Wyse believes that the parties could insist on an oath and regularly did so if a large sum was at stake.[3] There are several passages which deal with oaths in private arbitration, but they are not helpful.[4] And here again it is not clear in just what the oath consisted. It was probably the same as in public arbitration.

At the age of eighteen the boy was enrolled in the deme.[5] The *demotai* under oath examined the youth and voted on the question of whether he had reached the required age and whether he was a freeman and legally born. Undoubtedly the oath of the *demotai* had to do with a promise to vote to the best of their ability and in accordance with the laws.[6] It was a promissory oath.

After enrolment on the deme register the youth took his oath of allegiance. This was partly military, partly political; in fact, it included the whole duty of a citizen and was a promissory oath. This oath seems to have been taken at the

[1] Cf. Latte, *Heiliges Recht*, p. 42.

[2] *Public Arbitration*, "University of Missouri Studies," XI, No. 1, 21 ff.

[3] *Isaeus*, p. 450. Lipsius (*op. cit.*, pp. 222 ff.) asserts that there was no oath as long as the arbitrator acted merely as διαλλακτής, but that when he gave a judgment as διαιτητής he took an oath. Thalheim (*Hermes*, XLI, 152 ff.) shows that the extant cases of private arbitration do not warrant such a conclusion.

[4] Isaeus ii. 31; Demos. xxix. 58; xli. 15; lii. 31.

[5] Arist. *Ath. Pol.* xlii. 1.

[6] Cf. Demos. lvii. 63.

beginning of the second year of ephebic training.[1] The oath was as follows:

> I will never bring reproach upon my hallowed arms nor will I desert the comrade at whose side I stand, but I will defend our altars and our hearths, single-handed or supported by many. My native land I will not leave a diminished heritage but greater and better than when I received it. I will obey whoever is in authority and submit to the established laws and all others which the people shall harmoniously enact. If anyone tries to overthrow the constitution or disobeys it, I will not permit him, but will come to its defense single-handed or with the support of all. I will honor the religion of my fathers. Let the gods be my witnesses, Agraulus, Enyalius, Ares, Zeus, Thallo, Auxo, Hegemone.[2]

The action called *antidosis*[3] is an interesting illustration of a kind of suit which involved both a promissory and a confirmatory oath. At the preliminary hearing each of the two parties had to swear an oath that he would render an accurate inventory of his property.[4] The law required that the inventory should be given within three days of the day of the oath. The second oath occurred when the account was presented and stated that as presented it was a true and accurate inventory of the individual's possessions.[5]

As has been seen,[6] in its original form the evidentiary oath formed the entire trial and was final, i.e., it was not subject to rebuttal. But it was not possible that it should long continue to constitute necessarily the whole trial. In its surviving forms in the Attic orators we find that it might still form the whole trial and also that it might be part of a trial. Furthermore, in practically all cases it becomes subject to rebuttal. This is a natural development. The only way in which an evidentiary oath could come before a court was as

[1] Cf. Taylor, "The Athenian Ephebic Oath," *CJ*, XIII, 495 ff.

[2] Cf. Pollux viii. 105–6; Stobaeus *Flor.* xliii. 48; Lycurg. i. 76.

[3] Cf. Goligher, "Studies in Attic Law II," *Hermathena*, XIV, 481 ff.

[4] Demos. xlii. 1, 11–12.

[5] *Ibid.* 17–18. On the subject of the two oaths cf. Lipsius, *op. cit.*, p. 592; Francotte, *L'Antidosis en droit athénien;* Vollbrecht, *De antidosi apud Athenienses dissertatio*, p. 7; Böckh, *Staatsh. der Athener*, I³, 674.

[6] *Supra*, p. 146 f.

the result of a challenge. It is evident that such challenges were rarely accepted and little is heard of them except in so far as an argument is drawn from an opponent's refusal to accept a challenge to an oath.[1] It is doubtless true that sometimes an evidentiary oath was resorted to in order to settle a case without bringing it into court.

There is only one example in the Attic orators of what must have been the original use of the evidentiary oath, i.e., the oath taken as the result of a challenge to settle an entire case. In the two Boeotus speeches of Demosthenes reference is made to an earlier case which involved an evidentiary oath.[2] The case concerned the paternity of Pamphylus and Boeotus, the two sons of Plangon. Mantias, their alleged father, was sued by Boeotus for recognition as his son. Mantias desired to keep the case out of court and so had adopted the following plan. He was to give Plangon thirty minae and to challenge her to swear that the children were his. Of course, for the recompense of the thirty minae she was to refuse the challenge. But when the matter actually came up she did take the oath and swore that the children were the children of herself and Mantias. The oath settled the case. Therefore, Boeotus and Pamphylus were legally declared to be his children. The oath in this case was taken before an arbitrator, and Demosthenes says that it was taken in the Delphinium.[3] A similar oath is referred to in a case concerning the rejection of one Euphiletus from the deme list.[4] Among other proofs of Euphiletus' status the speaker declares that Euphiletus' mother had expressed her willingness to swear before an arbitrator in the sanctuary of the Delphinian Apollo an oath to Euphiletus' paternity. The alleged father of Euphiletus also was ready to swear a similar oath.[5]

There are various forms or survivals of the evidentiary oath which have a part in different legal processes. An inter-

[1] Cf. Bonner, *Evidence in Athenian Courts*, p. 75.

[2] Demos. xxxix. 2; xl. 10. [3] xl. 11. [4] Isaeus xii. 9.

[5] Cf. Lipsius (*op. cit.*, p. 228, n. 33), who believes that such an oath was taken in the Delphinium, but that it does not follow that the arbitrators had their sittings there.

esting oath occurs in connection with entrance of a child into the phratry. There were apparently different rules for different phratries.[1] There was not even uniformity about the age at which children should be admitted. Gilbert believes, however, that in general the introduction into the phratry took place in one of the early years of the child's life at the festival of the Apaturia.[2] There were two parts to the ceremony, *ἀνάκρισις* and *διαδικασία*. At the *anakrisis* in some phratries the father took an oath to the legitimacy of the child.[3] This oath, which is evidentiary, created a presumption that the contentions of the father were true and probably at least nine times out of ten settled the matter, but the oath was subject to rebuttal if anyone had doubts about its truth.[4] In other phratries the father had to bring forward three witnesses, who swore that the boy who was being introduced was the legitimate son of the introducer by a lawfully wedded wife.[5] These are both evidentiary oaths, but that they were subject to rebuttal is shown by the second part of the ceremony, the *diadikasia*, which was concerned with a vote on the reception of the child into the phratry. Admission into the phratry served as proof of the boy's relationship and consequently of his right of inheritance.

An interesting development in the evidentiary oath is the provision attributed to Solon by which both parties to a suit might swear an oath in cases in which there was no evidence:

[1] Cf. Gilbert, *Const. Antiqu.*, p. 191.

[2] Cf. Xen. *Hell.* i. 7. 8; Schol. on Aristoph. *Achar.* 146; Suidas, *s.v.* *Ἀπατούρια*.

[3] Andoc. i. 127; Isaeus vii. 16; viii. 19; Demos. lvii. 54.

[4] Cf. Ziebarth, *op. cit.*, p. 32. An analogous oath is that furnished by an inscription of Dyme, where citizenship was extended to foreigners of free birth on the payment of a talent to the state. All over seventeen years of age themselves took the oath. But if a man who was applying for citizenship had sons under seventeen, he took the oath that they were his legitimate sons and were under seventeen years of age. When they reached the age of seventeen they became citizens by reason of that oath (Collitz-Bechtel, *Sammlung der griechischen Dialekt-Inschriften*, 1614; Szanto, *Das griechische Bürgerrecht*, pp. 54, 113 f.). A Calaurian inscription furnishes another example of an evidentiary oath which admitted of rebuttal (Dareste-Haussoullier-Reinach, *op. cit.* [2d ser.], I, 104).

[5] *IG*², II, 1237, ll. 14 f., 70 f.

δοξασταί: κριταί εἰσιν οἱ διαγινώσκοντες, πότερος εὐορκεῖ τῶν κρινομένων. κελεύει γὰρ Σόλων τὸν ἐγκαλούμενον, ἐπειδὰν μήτε συμβόλαια ἔχῃ μήτε μάρτυρας, ὀμνύναι, καὶ τὸν εὐθύνοντα δὲ ὁμοίως.[1] Up to this time the evidentiary oath had been employed only with the consent of both parties. Now the magistrate was authorized to administer the oath and, if either one or both wished to take it, to base his verdict upon it. If both parties consented to take the oath of course his position became more difficult, but he might have some basis for his decision in the attitude of the oath-takers when they swore. It is not reasonable to suppose that in every case one of the litigants would refuse to take the oath. Unfortunately the content of the oath is unknown, but it is better for the reasons outlined above[2] to suppose that the two litigants swore to the truth of their pleadings rather than that they swore that they would tell the truth during the trial.

Originally restricted to certain cases (i.e., those in which no evidence was available) in the law quoted above, the evidentiary oath soon spread to other cases and at last became the normal practice in every form of trial. It is interesting to note that Plato connects the evidentiary oath and the preliminary party oath. He attributes to Rhadamanthus the idea of tendering to both parties an evidentiary oath in the hope of obtaining a swift and trustworthy verdict. This was satisfactory in the early days when men really believed in the gods and the punishment which would come as the result of a false oath. But Plato thinks that as opinions with regard to the gods change so should the laws be changed, and that the prosecutor in a suit should write down his charges but not swear an oath, while the defendant should write down his denial and give it over to the officials without an oath. For, reflects Plato, it is a terrible thing to know that there being so many trials in the city almost half of the parties in them have perjured themselves, and therefore the members of society are constantly in contact with perjured

[1] *Lex. Seg.*, p. 242. For a full discussion of this oath and its influence upon the later preliminary party oath cf. *supra*, I, 173; Latte, *op. cit.*, pp. 24 f.

[2] *Supra*, I, 173.

people.[1] In view of this Plato proposes that all party oaths should be abolished.

There were really, then, two types of party oath in court. One party might tender an oath to the other party or offer to take one himself. The orators give many examples of such offers. Only one party took this oath, and if taken it counted as a means of proof. This kind did not occur in the homicide courts. The other kind was taken by both parties. This was the oath of the *anakrisis* in which one party always swore falsely. This oath was not at all a means of proof.[2] It is in origin evidentiary, but in its developed form it was, like the oaths of witnesses, merely confirmatory.

There were various different terms for the oaths of the parties and the witnesses in the different types of suits. Naturally these became somewhat confused. It will be convenient to list the different terms together with their original and extended uses.[3]

Both the orators and the lexicographers, who of course based their work on the orators, badly confuse the technical terms which are used for the oaths of the prosecutor and the defendant. A common word for the party oath is *ἀντωμοσία*. This word should strictly refer to the oath of the defendant because he swore in reply to the oath of the prosecutor, which might be called *προωμοσία*.[4] We find, however, in some of the lexicographers and in the orators that *antomosia* has become a quite general term for the party oath.[5] The word also is applied to the sworn accusation of the prosecutor.[6] This oath is an affirmation of the truth of the pleadings. In private suits, however, the litigants had to swear also that they would

[1] *Laws* 948A ff.

[2] Cf. Philippi, *Der Areopag und die Epheten*, p. 88.

[3] For a convenient listing of the terms with illustrations cf. Ott, *op. cit.*, pp. 83 ff.

[4] Pollux viii. 55; this word does not, however, occur in any other passage in Greek literature. Suidas (*s.v.* *Διωμοσία* and *Ἀντωμοσία*) makes the same distinction between these two words which Pollux makes between *προωμοσία* and *ἀντωμοσία*.

[5] Cf. Harpocration, *s.v.; Lex. Seg.*, p. 200; Isaeus iii. 6; v. 2, 16; ix. 1, 34; Isoc. xvi. 2.

[6] Cf. Plato *Apol.* 19B; Thalheim, in Pauly-Wissowa, *s.v.* *Ἀντωμοσία*.

confine themselves to the issue.[1] In the same way ἀμφιορκία is used of the oaths of both parties.[2]

An interesting use of the *antomosia* in a special kind of case is that which occurs in *diadikasia* cases; that is, in cases which deal with claims to an estate. Here each of the claimants had to present a claim to the property in question and their claims had to be strengthened by an oath. The claim is sometimes called *antigraphé*[3] and the oath is called *antomosia*, although in a *diadikasia* there is strictly neither defendant nor prosecutor. However, there are always at least two claimants who stand in the places of parties.[4]

Another evidentiary oath is the ἐξωμοσία.[5] There are many passages which illustrate two uses of this oath of denial. In the first place it was possible by an *exomosia* for a man to swear that he was unable to undertake some act or office because of poverty or illness or some similar cause.[6] Aristotle[7] speaks of the *exomosia* in connection with the selection of the ἱππεῖς. The ten *katalogeis* list the *hippeis* and turn the list over to the hipparchs and phylarchs who take the list before the council. There the former list of *hippeis* is examined and the names erased of those who have taken an oath to the effect that they are not able to act as knights. Then those in the new list are summoned and anyone who swears to his inability to serve is released. This is an excellent example of an evidentiary oath. It is an oath to fact and it is apparently final.

The other use of the word *exomosia* has to do with witnesses. A witness had either to give the evidence for which

[1] Arist. *Ath. Pol.* lxvii. 1.

[2] Suidas, *s.v.*

[3] Cf. Lipsius, *op. cit.*, pp. 834, 830, n. 4.

[4] Demos. xliii. 3; cf. Leist, *Der attische Eigentumsstreit im System der Diadikasien*, pp. 10 f.

[5] Cf. Pollux viii. 55; Harpocration, *s.v.* Other examples of the *exomosia* are to be found in Demos. xix. 122 f. and Aeschin. ii. 94 f. There is a jocular use of the word in Aristoph. *Eccl.* 1026 as an excuse sworn to evade duty.

[6] *Pol.* 1297A: περὶ δὲ τὰς ἀρχὰς τὸ τοῖς μὲν ἔχουσι τίμημα μὴ ἐξεῖναι ἐξόμνυσθαι, τοῖς δ' ἀπόροις ἐξεῖναι.

[7] *Ath. Pol.* xlix. 2.

he was summoned or else to swear an *exomosia*, an oath of denial to the effect that he knew nothing about the case and could give no evidence.[1] The term *ἀπομνύναι* is sometimes equivalent to *ἐξομνύναι* in this sense.[2]

Suidas[3] says that the *exomosia* could be used also in connection with an objection to the admissibility of a suit:

> *ἐξωμοσία· ὅταν τις φάσκῃ ἢ ὑπὲρ ἑαυτοῦ ἢ ὑπὲρ ἑτέρου ἐγκαλούμενος, μὴ δεῖν εἰσάγεσθαι δίκην· εἶτα καὶ τὴν αἰτίαν, δι' ἣν οὐκ εἰσαγώγιμος ἡ δίκη. εἰ δοκεῖ κατὰ λόγον ἀξιοῦν, ἐδίδοτο αὐτῷ ἐξωμοσίᾳ χρῆσθαι. καὶ οὕτως διεγράφετο ἡ δίκη.*

Lipsius[4] agrees that *exomosia* might thus be used in later times as equivalent to *ὑπωμοσία*. He bases his statement on the above-mentioned passage from Pollux and on a statement of Theophrastus: *ἱκανὸς δὲ καὶ δίκας τὰς μὲν φεύγειν, τὰς δὲ διώκειν, τὰς μὲν ἐξόμνυσθαι, ταῖς δὲ παρεῖναι, ἔχων ἐχῖνον ἐν τῷ προκολπίῳ καὶ ὁρμαθοὺς γραμματιδίων ἐν ταῖς χερσίν.*[5] *ἐξόμνυσθαι* here might mean to refuse under oath to give testimony.

Again in the case of *ὑπωμοσία* there are two uses of the word. The first of these is an attempt under oath to delay an action by alleging absence from the city or illness or some other such excuse. Naturally, this process would usually be employed by the defendant in the case.[6] This was of course an evidentiary oath in character, but we find that this *hypomosia* had to be supported by the evidence of others.[7] In case such an oath was taken the other party, in most cases the plaintiff, could swear an *ἀνθυπωμοσία*, to the effect, one may judge, that there was no need for delay in the case. As has been shown above, this procedure of *hypomosia* occurs in connection with a *paragraphé* of a certain nature.[8]

[1] Pollux viii. 37, 55; Demos. xliv. 58–61; lvii. 59; Isaeus ix. 18; Lipsius, *op. cit.*, p. 880.

[2] Aeschin. i. 67; Plato *Laws* 936E. For the procedure followed by witnesses in swearing the *exomosia* cf. Lycurg. i. 20.

[3] *S.v.* *ἐξωμοσία.* [4] *Op. cit.*, p. 902, n. 3. [5] *Charac.* vi. 8.

[6] Pollux viii. 60; Harpocration, *s.v.;* Schol. on Demos. xxi. 84.

[7] Demos. xlviii. 25; lviii. 43.

[8] *Ibid.* xxi. 84; xxxix. 37; xlvii. 39; cf. *supra*, pp. 91 ff.

The second use of the word is in connection with the *graphé paranomon*. A man who objected to a proposed law or decree made a declaration under oath that he would bring a *graphé paranomon* against the originator of the law or decree.[1] Naturally this oath would result in suspension of the law until its validity was determined. Undoubtedly such an action must frequently have resulted in the dropping of the proposal.[2]

The word *ὑπόμνυσθαι* can be used also with the general meaning of an objection or protestation. So after the battle of Aegospotami, Euryptolemus urged that the ten generals be tried according to the decree of Cannonus, each separately. The council, on the other hand, proposed to try them all together. The assembly at first voted to follow Euryptolemus' plan, but at the objection of Menecles another vote was taken and they decided to abide by the decision of the council: *ὑπομοσαμένου δὲ Μενεκλέους καὶ πάλιν διαχειροτονίας γενομένης ἔκριναν τὴν τῆς βουλῆς.*[3]

Originally *διωμοσία* seems to have referred only to the party oath in homicide, perhaps at first only to the oath of the prosecutor.[4] Leisi[5] thinks that the term was used of an oath which if false brought down the greatest divine punishment.[6] It was a very strong and very solemn oath. As such

[1] Pollux viii. 56; Demos. xviii. 103; Aristoph. *Plut.* 725, *ἐπομνύμενον* codd.: *ὑπομνύμενον* corr. Girard.

[2] A remark in the *Lex. Seg.*, p. 313, indicates that the withdrawal of the proposal could also be known as *hypomosia*, but, as Thalheim has pointed out in Pauly-Wissowa, *s.v.* *Ὑπωμοσία*, this is probably due to a misunderstanding of Demos. xviii. 103: *καίτοι πόσα χρήματα τοὺς ἡγεμόνας τῶν συμμοριῶν ἢ τοὺς δευτέρους καὶ τρίτους οἴεσθέ μοι διδόναι, ὥστε μάλιστα μὲν μὴ θεῖναι τὸν νόμον τοῦτον, εἰ δὲ μή, καταβάλλοντ' ἐᾶν ἐν ὑπωμοσίᾳ;*

[3] Xen. *Hell.* i. 7. 34. [4] Antiph. v. 88, 90, 96. [5] *Op. cit.*, p. 59.

[6] There are many passages in which the word *διόμνυσθαι* occurs in the sense of a strong oath. For instance, in Demos. xviii. 286 the word is used to strengthen *ἠρνεῖσθε*: *ἃ γὰρ εὐθενούντων τῶν πραγμάτων ἠρνεῖσθε διομνύμενοι, ταῦτ' ἐν οἷς ἔπταισεν ἡ πόλις ὡμολογήσατε.* *διομνύμενοι* here is equivalent to *ὤμοσεν* in Andoc. i. 126: *λαβόμενος τοῦ βωμοῦ ὤμοσεν ἢ μὴν μὴ εἶναί (οἱ) υἱὸν ἄλλον μηδὲ γενέσθαι πώποτε, εἰ μὴ Ἱππόνικον ἐκ τῆς Γλαύκωνος θυγατρός· ἢ ἐξώλη εἶναι καὶ αὐτὸν καὶ τὴν οἰκίαν, ὥσπερ ἔσται.* Cf. Lysias xii. 10; Aeschin. i. 114. *διόμνυσθαι* is used again of an oath to relationship in Isaeus xi. 6.

it would naturally be used of the parties in homicide cases. The *diomosia* of the prosecutor consisted of three things: First, he swore to his right to prosecute; this of course involved his relationship to the deceased.[1] Second, he swore that the defendant was guilty.[2] Finally, he swore that he would confine himself in his prosecution to the matter in hand.[3] This, it will be seen, is quite different from the *antomosia* in other types of cases where the prosecutor merely swore to the truth of his pleadings. The defendant in a homicide trial, on the other hand, in his *diomosia* swore merely that he was not guilty.[4]

But the word had a wider use and was carried over to the oaths of the parties in other kinds of suits.[5] While the lexicographers recognize that the word is properly applied to the oath in homicide trials, yet they constantly show that in practice the word was used without distinction both of the oath in a homicide trial and of the oath at the *anakrisis* in other types of trial.[6]

The word was carried over from the oaths of the parties in homicide trials to the oaths of witnesses in homicide trials.[7] Naturally, then, the word came to be used also of the witness oath in other types of trials.[8] The witness oath was required before the homicide courts. In the first speech of Antiphon there are no witnesses in court perhaps because they could not swear to the guilt of the defendant.[9] In Lysias[10] the witness oath before the Areopagus is said to be obligatory:

[1] Demos. xlvii. 70 ff.; cf. Pollux viii. 118: *Ἄρειος πάγος: φόνου δὲ ἐξῆν ἐπεξιέναι μέχρις ἀνεψιῶν, καὶ ἐν τῷ ὅρκῳ ἐπερωτᾶν τίς προσήκων ἐστὶ τῷ τεθνεῶτι. κἂν οἰκέτης ᾖ, ἐπισκήπτειν συγκεχώρηται.* Philippi (*op. cit.*, p. 83) believes that this passage was derived from Demos. xlvii. 72, which Pollux misunderstood.

[2] Antiph. vi. 16; Lysias iii. 4; x. 11; Demos. lix. 10.

[3] Antiph. v. 11.

[4] *Ibid.* vi. 16; Lysias x. 11.

[5] Isaeus xi. 6; Demos. xl. 41.

[6] Cf. Suidas, Harpocration, Hesychius, *s.v.*

[7] Lysias iv. 4; Antiph. i. 28; v. 12, 15.

[8] Demos. lvii. 22, 39, 44; xlix. 20; Aeschin. ii. 156.

[9] Cf. Leisi, *op. cit.*, p. 58; Gernet, *Antiphon: Discours*, p. 37; Blass, *Att. Bered.*, I, 189.

[10] iv. 4.

καὶ ὅτι ἀληθῆ ταῦτα λέγω, Φιλῖνος καὶ Διοκλῆς ἴσασιν. ἀλλ' οὐκ ἔστ' αὐτοῖς μαρτυρῆσαι μὴ διομοσαμένοις περὶ τῆς αἰτίας ἧς ἐγὼ φεύγω. It is probable that the same rule applied in all the homicide courts. In each case the nature of the evidence given under oath is clear. It was to the guilt or innocence of the defendant. Witnesses in the homicide courts also swore to the relationship of the prosecutor to the deceased.

There are various questions connected with the oaths of the parties in the homicide courts. It has been maintained that only the prosecutor swore the *diomosia* because some of the sources speak only of the oath of the prosecutor.[1] But other sources show that the same oath was administered to the defense.[2] It is clear, therefore, that although the oath in this connection is a survival of the evidentiary oath, it is so far removed that it is no longer in any sense a means of proof. We have here, as in other types of cases, a solemn oath on the part of each party, one of whom must be swearing falsely. It therefore could have no direct weight in settling the case.[3] It may have helped to keep thoughtless charges from being filed and have given evidence of the sincerity of each party's conception of the circumstances. That is, the oath, while false, may on many occasions have been sworn in good faith. Without doubt both parties took the oath.[4]

The chief passage on *diomosia* before the Areopagus[5] gives much information, namely, the fact that both parties took the oath, the details of the procedure in the oath, the curse attached to it. Demosthenes says that it is not an ordinary oath, but one which is used for nothing else. The same oath was taken in cases which came before the Palladium.[6] Gilbert[7] believes that this passage also proves that the oaths in a homicide trial were taken not at the preliminary investigation but at the actual trial. He is led to believe this because of his contention that a homicide case was referred to the

[1] Antiph. v. 11–12, 96; Lysias iii. 1, 21; Demos. xlvii. 70; lix. 10.

[2] Antiph. vi. 16; Lysias x. 11; Demos. xxiii. 63, 69; *Lex. Seg.*, p. 239.

[3] Cf. Philippi, *op. cit.*, p. 89.

[4] Cf. Latte, *op. cit.*, p. 23.

[5] Demos. xxiii. 67 ff.

[6] *Ibid.*

[7] *Op. cit.*, p. 385, n. 3.

proper court after the preliminary investigation. This being the case, the Demosthenes passage which mentions the oath as being taken at the Areopagus and at the Palladium must prove that the oaths were taken at the actual trial after the case had been referred to one of the homicide courts. Philippi[1] takes exactly the opposite position. The oaths were taken at the preliminary investigation. Inasmuch as the Demosthenes passage mentions oaths before the Areopagus and the Palladium, the *prodikasiai* must have been held in those courts and therefore the case was assigned to the proper court before the preliminary investigation.

Lipsius[2] points out that the natural course would have been to have the highly ceremonial oath at the actual trial and that some passages from the orators bear out this procedure, but that on the other hand the oath to relationship must have been taken earlier, that is, at the preliminary investigation. It is true that it seems unthinkable that the *basileus* would go ahead with the case at all unless the prosecutor had given assurance of his right to prosecute. Lipsius therefore assumes two oaths.[3]

Unfortunately we obtain little help from the orators about the matter. As has been said above, it seems absolutely necessary that the oath of the prosecutor to his relationship to the deceased should have taken place at the preliminary investigation, for in a homicide trial no one except relatives up to a certain degree was allowed to prosecute and the *basileus* would have had to be assured that a competent person was acting as prosecutor before he undertook the case.[4] By analogy with other types of cases in which we know that the *antomosiai* were sworn at the *anakrisis* it seems fair to sup-

[1] *Op. cit.*, pp. 87 ff. [2] *Op. cit.*, pp. 830 f.

[3] It is interesting to see how Lipsius and Philippi each use the same passage to prove his own theory. Antiphon vi. 14 says: *πολλοὶ τῶν περιεστώτων τούτων τὰ μὲν πράγματα ταῦτα πάντα ἀκριβῶς ἐπίστανται, καὶ τοῦ ὁρκωτοῦ ἀκούουσι.* Philippi takes this to mean that the same people were present both at the trial and at the preliminary investigation. Hence they heard the oath of the preliminary investigation. Lipsius, on the other hand, thinks that the passage must mean that the oath was taken at the trial.

[4] Cf. *supra*, I, 114 f.

pose that in homicide cases also the oaths were sworn at the preliminary investigation. In fact, the two oaths correspond: in other cases the parties swore to their pleadings; in homicide cases they in effect did the same thing, the prosecutor swearing to the guilt of the accused, the defendant to his own innocence. It may be suggested that, while undoubtedly the party oaths were sworn at the preliminary investigation in homicide cases, it is quite possible also that these oaths, with a solemn sacrifice, were repeated at the actual trial. Since it is substantially the same oath on both occasions ancient authors do not make any distinction. That such is the case is borne out by the passage of Demosthenes cited above in which we are told that the oath over the solemn sacrifice was taken both in the Areopagus and in the Palladium:

ἴστε δήπου τοῦθ' ἅπαντας, ὅτι ἐν Ἀρείῳ πάγῳ, οὗ δίδωσ' ὁ νόμος καὶ κελεύει τοῦ φόνου δικάζεσθαι, πρῶτον μὲν διομεῖται κατ' ἐξωλείας αὐτοῦ καὶ γένους καὶ οἰκίας ὅ τιν' αἰτιώμενος εἰργάσθαι τι τοιοῦτον, εἶτ' οὐδὲ τὸν τυχόντα τιν' ὅρκον ἀλλ' ὃν οὐδεὶς ὄμνυσ' ὑπὲρ οὐδενὸς ἄλλου, στὰς ἐπὶ τῶν τομίων κάπρου καὶ κριοῦ καὶ ταύρου καὶ τούτων ἐσφαγμένων ὑφ' ὧν δεῖ καὶ ἐν αἷς ἡμέραις καθήκει, ὥστε καὶ ἐκ τοῦ χρόνου καὶ ἐκ τῶν μεταχειριζομένων ἅπαν, ὅσον ἔσθ' ὅσιον πεπρᾶχθαι. . . . . καὶ τῷ μὲν διώκοντι ὑπάρχει ταῦτα, τῷ δὲ φεύγοντι τὰ μὲν τῆς διωμοσίας ταὐτά. . . . . καὶ γὰρ ἐνταῦθ' [in the Palladium] *ὑπόκειται πρῶτον μὲν διωμοσία, δεύτερον δὲ λόγος, τρίτον δὲ γνῶσις τοῦ δικαστηρίου, κ.τ.λ.*[1]

This leads to another question: whether the same oath was taken in all the homicide courts, or at least in the Areopagus, the Palladium, the Delphinium, and in Phreatto. Philippi states[2] that the oath was taken in all four courts. He is apparently not including the Prytaneum, in which, although there might be a *diomosia* of the prosecutor, there certainly could not be a *diomosia* of the defendant, inasmuch as the defendant was either an animal, an inanimate object, or an unknown person. Now in a very rhetorical passage Demosthenes speaks as follows:

οὗ γὰρ οὐ κλῆσις, οὐ κρίσις, οὐ μαρτυρία συνειδότος, οὐ διωμοσία, ἀλλ' ἀπ' αἰτίας εὐθὺς ἡ τιμωρία γέγραπται, καὶ αὕτη ἣν ἀπαγορεύουσιν οἱ νόμοι, τί ἂν ἄλλο τις εἴποι; καίτοι ταῦτα πάντ' ἐπὶ πέντε δικαστηρίοις γίγνεται προστεταγμένα τοῖς νόμοις.[3]

[1] Demos. xxiii. 67–71. [2] *Op. cit.*, p. 87. [3] xxiii. 63.

Doubtless his statement is true for all five courts as far as the prosecutor is concerned, but, as has already been pointed out, it cannot be true of the *diomosia* for the defendant in the Prytaneum nor can there have been any oath for the defendant in some of the cases before the Delphinium court in which cases of justifiable homicide were tried. In his detailed description of the five homicide courts Demosthenes specifically mentions the oath which is to be sworn by the plaintiff and the defendant in cases before the Areopagus and the Palladium, but when he turns to the court of the Delphinium there is no reference to the *diomosia*.[1] And in other passages where we have references to the oaths of the parties in homicide cases the reference is always to the courts of Areopagus and Palladium.[2] In connection with his discussion of the Delphinium, Demosthenes mentions the case of Orestes who, as Demosthenes says, admitted that he had killed his mother, but insisted that his deed was justifiable.[3] Justifiable homicide carried no moral guilt with it. In fact, the killer was not even polluted. This leads us to a consideration of the passage in Aeschylus[4] in which the Erinyes complain that Orestes will neither take an oath nor tender one. The explanation is obvious. Since he is admittedly the slayer he cannot take an oath that he is not guilty. The only thing that he can do is to plead that his act was justifiable.

In cases, then, which ultimately came before the three homicide courts, Areopagus, Palladium, and in Phreatto, at the preliminary investigation both the prosecutor and the defendant took oaths, the prosecutor to the effect that he was a relative in the proper degree to the deceased and that the defendant was guilty, the defendant to the effect that he was

[1] For Demosthenes' description of the Delphinium cf. xxiii. 74: *τρίτον δ' ἕτερον πρὸς τούτοις δικαστήριον, ὃ πάντων ἁγιώτατα τούτων ἔχει καὶ φρικωδέστατα, ἄν τις ὁμολογῇ μὲν κτεῖναι, ἐννόμως δὲ φῇ δεδρακέναι. τοῦτο δ' ἐστὶ τοὐπὶ Δελφινίῳ.*

[2] Cf. Antiph. i. 28; Lysias x. 11; Demos. xlvii. 70; lix. 9.

[3] xxiii. 74: *λογιζόμενοι δ' ὅτι μητέρ' Ὀρέστης ἀπεκτονὼς ὁμολογῶν θεῶν δικαστῶν τυχὼν ἀποφυγγάνει, νομίσαι δίκαιόν τιν' εἶναι φόνον· οὐ γὰρ ἂν τά γε μὴ δίκαια θεοὺς ψηφίσασθαι.*

[4] *Eumen.* 429.

not guilty. These oaths were probably repeated over a solemn blood sacrifice in the homicide court at the beginning of the actual trial. In most cases before the Delphinium and at the Prytaneum (both of which incidentally are purely ceremonial courts) the prosecutor alone swore as to his relationship with the slain person and as to the guilt of the defendant.

There is some evidence for two other oaths during the course of a homicide trial. A statement is found in the *Lexica Segueriana*[1] to the effect that a second oath, apparently a repetition of the oath which occurred at the beginning of the trial, was taken after the first speeches of the prosecutor and the defendant:

διωμοσία· ὅρκος ἐστίν, ὃν ὤμνυον οἱ φόνου ἀγῶνα διώκοντες ἢ φεύγοντες· ἀμφότεροι γὰρ ὤμνυον μετὰ τὸ εἰπεῖν τὸν πρότερον λόγον· ὁ μὲν ἢ μὴν ἀληθῆ κατηγορηκέναι καὶ δικαίως, ὁ δὲ ἢ μὴν ἀληθῆ ἀπολελογῆσθαι καὶ δικαίως· ὤμνυον δὲ καὶ πρὶν εἰπεῖν τὸν αὐτὸν ὅρκον ἀμφότεροι, ἐπενεχθείσης ἤδη τῆς ψήφου, εἰ μὴ δικαίως νενικηκέναι, ἐξώλειαν ἑαυτῷ ἐπαρώμενος, εἰ ἐξηπάτησεν.

This passage is accepted by Mederle.[2] Together with the oath which the winner of the case took after the trial was over to the effect that as many of the judges as had voted in his favor had voted justly and that no false statements had been made there would have been three oaths.[3] There is, however, no other evidence for the oath after the first speeches, and it seems extremely unlikely that any such oath was sworn. The writer of the foregoing passage may have confused it with the right of the defendant to withdraw after the first speech or, as Lipsius thinks,[4] he may have made some wrong inference from the passage cited below from Aeschines. Philippi does not deal with this alleged oath at all. The oath of the winner after the trial, however, may be accepted on the testimony of Aeschines, although this is the only reference to such an oath. It is accepted by Lipsius and by Mederle:

[1] P. 239.

[2] *De iurisiurandi in lite Attica decem oratorum aetate usu*, pp. 23 f.

[3] Aeschin. ii. 87.

[4] *Op. cit.*, p. 833, n. 17.

ἢ πῶς οὐκ εἰκότως οἱ πατέρες ἡμῶν ἐν ταῖς φονικαῖς δίκαις ταῖς ἐπὶ Παλλαδίῳ[1] κατέδειξαν, τέμνοντα τὰ τόμια τὸν νικῶντα τῇ ψήφῳ ἐξορκίζεσθαι, καὶ τοῦτο ὑμῖν πάτριόν ἐστιν ἔτι καὶ νῦν, τἀληθῆ καὶ τὰ δίκαια ἐψηφίσθαι τῶν δικαστῶν ὅσοι τὴν ψῆφον ἤνεγκαν αὐτῷ, καὶ ψεῦδος μηδὲν εἰρηκέναι, εἰ δὲ μή, ἐξώλη αὐτὸν εἶναι ἐπαρᾶσθαι καὶ τὴν οἰκίαν τὴν αὐτοῦ, τοῖς δὲ δικασταῖς εὔχεσθαι πολλὰ καὶ ἀγαθὰ εἶναι;

Still another oath is connected with homicide trials, the oath of the relatives on granting *aidesis* to a homicide who is in exile. The nature of this oath is not specified, but from the fact that no oath is required from phratry members in case there are no relatives and the phratry members have to act on the granting of *aidesis*, it is a safe guess that the oath was to substantiate the claims of the relatives to relationship with the deceased. The oath is mentioned in the fragment of the homicide laws of Draco as they appeared in the revision of 409–408 B.C.[2]

There remains the question of the persons to whom the party oath in other cases was administered. Philippi[3] suggests that outside of homicide cases the introductory oath was administered only to the plaintiff. But the very name *antomosia* argues for an oath of the defendant. Further, there are several passages which disprove Philippi's statements. Isaeus seems definitely to refer to a preliminary oath of both parties: ἑκατέρῳ οὖν ἡμῶν, ἐξ ὧν ἀντωμόσαμεν σκεψάμενοι, ψηφίσασθε.[4] Antiphon refers to the oath of the defendant: πῶς οὖν εὔορκα ἀντομωμοκὼς ἔσται φάσκων εὖ εἰδέναι, κ.τ.λ.[5]

Whether witnesses in other than homicide trials were regularly sworn has been a matter of much dispute. Diogenes Laertius states that no evidence was given in Athens without

[1] ἐπὶ Παλλαδίῳ is considered a gloss by Lipsius. Cf. Philippi (*Rhein. Mus. f. Phil.*, XXIX, 10), who believes that the gloss was added by someone who remembered Demos. xlvii. 70: ὥστ' εἰ διομεῖ ἐπὶ Παλλαδίῳ αὐτὸς καὶ ἡ γυνὴ καὶ τὰ παιδία καὶ καταράσεσθε αὐτοῖς καὶ τῇ οἰκίᾳ, χείρων τε δόξεις πολλοῖς εἶναι, κἂν μὲν ἀποφύγῃ σ', ἐπιωρκηκέναι, ἐὰν δὲ ἕλῃς, φθονήσει. Inasmuch as the passage continues with some remarks about unjustifiable homicide as opposed to justifiable homicide, it may well be a gloss. It seems that if such a procedure was followed in one homicide court it might well be in all of them.

[2] For a full discussion of the matter cf. *supra*, I, 112 ff.

[3] *Op. cit.*, p. 89.

[4] ix. 34.

[5] i. 8; cf. Lipsius, *op. cit.*, p. 830, n. 4.

oath. Speaking of Xenocrates, he says: *ἦν δὲ καὶ ἀξιόπιστος σφόδρα, ὥστε μὴ ἐξὸν ἀνώμοτον μαρτυρεῖν, τούτῳ μόνῳ συνεχώρουν Ἀθηναῖοι.*[1] But this cannot be correct. In fact, in the Herodes murder trial, in which the defendant was tried as a *kakourgos* and not as a homicide, he complains that he must submit to the evidence of witnesses who had taken no oath, whereas if he had been tried as a homicide it would have been necessary for the witnesses to be under oath.[2] This may be mere rhetoric on the part of the speaker to indicate that in the present suit the witnesses have not taken the very solemn oath which they would have had to take before a homicide court. From all the references to witness oaths before the non-homicide courts, it is apparent that they were considered of slight importance. Such oaths were administered not by the magistrates but by the parties, and it seems to have been the privilege of a party to administer such an oath to his opponent's witnesses if he desired to do so. Witnesses were not always sworn, but any witness might take an oath.[3] A witness might in court take an oath of any one of the three following varieties: (1) an oath as the result of a challenge; (2) a voluntary oath to make his evidence more impressive in the interest of a friend; (3) possibly an oath at the instance of the party for whom he appeared, as the result of a suspicion that he would prove adverse.

In two cases there are references to oaths to be sworn by witnesses in court.[4] Lipsius argues from these that there could have been no regular witness oath as in these two cases there would then be two oaths from the witness regarding the same matter.[5] Leisi[6] agrees with this and disagrees with Bonner,[7] who, without arguing that there was such a double oath, yet sees no objection to it inasmuch as the second oath would have been much more impressive in character and would have been administered only with the consent of the

[1] iv. 2. 7.

[2] Antiph. v. 12.

[3] Bonner, *Evidence in Athenian Courts*, pp. 76 ff.; Lipsius, *op. cit.*, pp. 884 f.

[4] Demos. xlv. 57 f.; liv. 26.

[5] *Op. cit.*

[6] *Der Zeuge*, p. 64.

[7] *Op. cit.*, p. 77.

witness. Hence the two cases do not prove Lipsius' point, although he is undoubtedly correct in his main contention that there was no regular witness oath.[1]

There is some dispute about the necessity of oaths in extra-judicial depositions. It was possible for a witness because of illness or absence from the city to give his testimony in writing in the presence of witnesses. This is called ἐκμαρτυρία.[2] This document could subsequently be produced in court accompanied by affidavits of the witnesses who had heard the testimony given. There are two parts to such testimony then, the extra-judicial deposition and the affidavits of the attesting witnesses. That there was no oath involved is agreed upon by Bonner,[3] Leisi,[4] and Lipsius.[5] Glotz,[6] however, believes that an oath was required. But in view of the fact that the witness ran the same danger of a suit for false evidence as he would run in any other case it does not seem likely that an oath was required any more than if he were present in the court. The theory that there was an oath rests upon the procedure in an inscription which deals with procedure in Cnidos where οἱ ἐκμαρτυροῦντες are ordered to take an oath.[7]

In his classification of oaths, in addition to promissory and evidentiary oaths, Hirzel takes account of a third type which he calls the *Echtheitseide*, that is, an oath as to genuineness. This oath he refers to the present as opposed to the evidentiary oath which he refers to the past and the promissory oath which he refers to the future.[8] By his *Echtheitseide* Hirzel is referring to the institution of Eideshelfer or, as we call them for lack of a better term, "oath-helpers" or "compurgators."

[1] There are many references to the witness oath in non-homicide cases, although it was not obligatory; cf. Isaeus ix. 19, 24; xii. 9 f.; Aeschin. ii. 156; Demos. xviii. 137; xxix. 54; xlv. 58; lii. 28; liv. 26; lvii. 22, 36, 39, 44, 56; Xen. *Apol. of Soc.* xxiv.

[2] Cf. *supra*, pp. 132 ff.

[3] *Op. cit.*, p. 26.

[4] *Op. cit.*, p. 66.

[5] *Op. cit.*, p. 887.

[6] In Darem.-Saglio, *s.v.* "Jusjurandum."

[7] Dittenberger, *Sylloge*[3], 953; Collitz-Bechtel, *op. cit.*, 3591; Dareste-Haussoulier-Reinach, *op. cit.*, X, ll. 24 ff.

[8] *Op. cit.*, p. 6. Hirzel is wrong in referring the evidentiary oath only to the past, for it may refer to the present status of a matter equally as well.

Compurgation has regularly been treated as an independent institution. But it is really a development of the evidentiary oath, and many of its peculiarities become clear only if this fact is recognized. In the various legal systems the evidentiary oath was early felt to be insufficient and, as has been seen to be the case in the Athenian legal system, it survived in modified forms in only a few instances. Frequently the oath of the principal had to be supported by auxiliary oaths varying in number according to the matter at issue.[1] This form of trial was especially common in the Middle Ages,[2] and a description of the details of the practice in that period may serve to clarify the institution as it appears in Greek legal systems. In German law the co-swearers were known as *Eideshelfer*, in English as oath-helpers or compurgators.[3] Under both systems the helper swore merely to his confidence in the principal's oath.[4] It had nothing whatever to do with the fact

[1] Thayer, *A Preliminary Treatise on Evidence at the Common Law*, p. 24; Schröder, *Lehrbuch der deutschen Rechtsgeschichte*, p. 83.

[2] Grimm, *Deutsche Rechtsaltertümer*, II, 495 ff.

[3] A late Latin word. The institution was quite unknown in Roman law. In English law the institution itself is known as "compurgation" or "wager of law." German law, aside from the term *Eideshelfer*, uses the Latin names *consacramentales* and *coniuratores* and designates the institution *Eidhilfe*. The institution was in use in France also in the case of heretics (cf. Du Cange, *Glossarium*, *s.v.* "Compurgator"). The oath was as follows: "Ego talis juro per Deum et haec sancta quattuor Evangelia, quae in manibus meis teneo, me firmiter credere quod talis non fuit Insabbatus, Valdensis, vel Pauperum de Lugduno, neque Haereticus credens errorum erroribus, et credo firmiter eum in hoc jurasse verum."

[4] In both England and Germany oath-helpers were apparently first used in criminal suits, for all the earliest cases belong to this kind of action (cf. Grimm, *op. cit.*, II, 491). In later times, however, trial by compurgation was admitted in civil suits, in England surviving chiefly in cases of detinue and debt. In an action of debt, unless the plaintiff relied on a sealed document, the defendant as a rule might wage his law (cf. Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, 214). The institution early fell into disuse in criminal suits in England. There from the beginning it was used both in ecclesiastical courts (*ibid.*, I, 443) and in the king's courts as an optional form of trial alongside trial by jury. In the fourteenth century a citizen had a choice between the Great Law and a jury of twelve (*ibid.*, II, 634–36). The institution had nearly disappeared by the latter half of the eighteenth century, but as late as 1824 a case appeared in which a debtor demanded compurgation and the practice was not officially discontinued until 1833, when further use of it was forbidden by an act of Parliament (cf. Thayer, *op. cit.*). In Germany in the Middle Ages compurgation was restricted almost en-

at issue. Any freeman might wage his law.[1] Slaves, not being competent to take an oath, were consequently not allowed as oath-helpers. It is generally believed that in the earlier stages of the institution a man had as oath-helpers only his own relatives. Naturally the relatives would be most keenly interested, since the accusation, if not disproved, might cause a feud.[2] It was also a matter of duty.[3] As time went on, however, the right to take the oath was extended to neighbors and friends. Naturally only people who knew the principal well—relatives, neighbors, intimate friends—could be admitted as oath-helpers.[4] It was always a distinctly partisan institution. Oath-helpers had to be of age.[5] As a general rule women could not act as oath-helpers.[6] The rank of an oath-helper might depend on that of his principal, or on that of the person injured, for instance on that of the deceased in a homicide case.[7] In the beginning oath-helpers must always have been on the side of the defendant. It is of course a very natural growth of the institution that the privilege should eventually be extended to the plaintiff as well,[8] just as in the case of the evidentiary oath of the principal.

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tirely to criminal suits. The oath-helpers in civil suits gradually faded into witnesses who testified from their own knowledge (Schröder, *op. cit.*, p. 715). A case in which *Eideshelfer* were used in the year 1548 shows that the institution in Germany lasted until a late period.

[1] Only a freeman was capable of paying *Wergeld* (Grimm, *op. cit.*, II, 495 ff.). The only exception to the rule that any freeman might be tried by compurgation is found in Salic law where it is stated that only nobles were allowed trial by compurgation, although any freeman could be tried in that way if the plaintiff gave his consent.

[2] Pollock and Maitland, *op. cit.*, II, 600.

[3] Schröder, *op. cit.*, p. 70.

[4] *Ibid.*, p. 83.

[5] Grimm, *op. cit.*, II, 543.

[6] *Ibid.*, I, 563. There are exceptions to this rule. In the ecclesiastical courts of England a woman strengthened her cause with women oath-helpers. Among certain Germanic peoples also women could support the oath of a litigant, as, for example, among the Lombards and Burgundians (*ibid.*, II, 495).

[7] *Ibid.*

[8] In English law there is no case cited by Thayer or by Pollock and Maitland in which the oath-helpers aided the plaintiff until the later stages of the institution when it had begun to be used in civil suits (Pollock and Maitland, *op. cit.*, II, 634–

The procedure was quite simple. In England when the litigant was permitted to wage his law the court fixed the number of compurgators which he must produce,[1] since the number varied according to the importance of the case.[2] As the institution developed the method of choosing the oath-helpers changed. At first the selection lay entirely with the party to the suit,[3] but later they were chosen by the adversary or the judge. But under this later procedure the litigant always retained the right to reject those who were chosen if he could satisfactorily support his refusal to accept them. The oath-helper, on the other hand, had the right to refuse to take oath if he was unable to reconcile it with his conscience.[4] In the primitive stages of every legal system there is apparent a great fear of committing perjury. Herein, as in the case of the evidentiary oath of the parties, consist the safeguards which made the institution a sounder means of proof than it seems to be. When the trial took place the oath was administered to the litigant by the adversary in early times and in later times by the judge. The litigant repeated it word for word. Then the oath-helpers had to swear, at first, it seems, jointly, but in later times singly.[5] By the individual oath it was made to appear a more personal and solemn thing. The content of the oath is much the same in both systems. In English courts they swore: "The oath is clean that ———

36; cf. Grimm, *op. cit.*). In Germany also the *Eideshelfer* seem originally to have aided the defendant exclusively, although later they appear even in homicide cases on the side of the plaintiff. An old law is mentioned by Meister according to which the plaintiff in a homicide trial could with two *Eideshelfer* swear that the defendant was guilty (cf. Meister, *Rhein. Mus.*, LXIII, 575, n. 1).

[1] Pollock and Maitland, *op. cit.*, II, 610.

[2] An interesting illustration of this is the different number of oath-helpers required by the three laws in London in the thirteenth century (*ibid.*, pp. 634–36). Twelve seems to have been the normal number in both the Germanic and the English systems (cf. *ibid.*, p. 600; Thayer, *op. cit.*, p. 90; Schröder, *op. cit.*, p. 358). Only rarely was the oath with one helper sufficient (Grimm, *op. cit.*, I, 285). Occasionally as many as three hundred oath-helpers are found.

[3] Schröder, *op. cit.*, pp. 83, 384; Pollock and Maitland, *op. cit.*, I, 140.

[4] Schröder, *op. cit.*, p. 83; Pollock and Maitland, *op. cit.*, I, 140.

[5] Schröder, *op. cit.*, p. 354.

hath sworn,"[1] although it might also take a less positive form, i.e., they might swear that the oath was true to the best of their knowledge.[2] In the Germanic system they swore that the oath of the principal was *rein und unmein*.[3] So in neither system is an oath-helper ever found who swore to the fact, although there are undeniably cases in which the fact was known. That the procedure was highly ceremonial is shown by the fact that great emphasis was put upon the form of the oath as sworn by the oath-helper.[4] The compurgator who swore to the innocence of a person who was really guilty was not liable to a charge of perjury. There is no action and consequently no penalty for a false oath. The idea seems to have been that such punishment was the affair of the gods. A man could, however, be convicted of giving false evidence. But in compurgation the oath-helper swore to his own belief, not to the facts of the case which presumably he did not know. He would not, therefore, be liable to a charge of giving false evidence.

The institution of compurgation in England and Germany was never developed further than this. The oath-helpers never swore to anything except their confidence in the principal. It is true that they appear sometimes on one side of the case, sometimes on the other. It is true also that they must have known the facts on many occasions. But this in no wise changed the character of their oath.

[1] Pollock and Maitland, *op. cit.*, I, 140.

[2] *Ibid.*, II, 600. Cf. the formula used in London, thirteenth century: "Quod secundum scientiam suam iuramentum quod fecit fidele est." This does not, however, imply any knowledge at all of the fact, i.e., it does not mean that they have positive knowledge that the oath is true, but merely that they know of nothing which makes it untrue.

[3] Schröder, *op. cit.*, p. 83: "Die Eideshelfer hatten nicht die objektive Wahrheit, sondern nur die subjektive Reinheit des Haupteides zu beschwören." Cf. Grimm, *op. cit.*, II, 495 ff. and 541: "Eideshelfer schwuren nicht dass eine That wahr sei, sondern dass der, dem sie halfen, einen echten Eid ablege."

[4] At the use of a wrong word the oath "bursts" and the adversary wins (cf. Pollock and Maitland, *op. cit.*, II, 600; Schröder, *op. cit.*, p. 358). There are further specifications as to the physical attitude in which an oath must be taken. Often the helper must grasp the arm or shoulder of his principal as he speaks the oath (Grimm, *op. cit.*, II, 551; cf. II, 129).

Although the institution was so well known in medieval law no one had observed any instance of it in the legal systems of the ancient Greeks until in 1895 Zitelmann[1] declared that he had found some cases of oath-helpers in the great Gortyn inscription. He was followed by various scholars who pointed out additional examples of the institution elsewhere in Greece,[2] and the whole matter was subjected to a careful study by R. M. E. Meister,[3] who collected and discussed all the previously alleged occurrences of the institution and added a few new examples. Although the examples of the institution in Greece are non-Athenian, they are worth some consideration as a background for the survivals which occur in the Athenian system.

Before examining the various passages adduced by Meister and his predecessors in support of the existence of the institution in Greece it will be well to point out that oath-helpers as a distinct class of witnesses are not mentioned by any Greek author. Nor does any certain technical name for them occur in Greek inscriptions.[4] No definite reference to the institution is found in the Attic orators, and the lexicographers who confine themselves to the explanation of what occurs in the orators are silent. Not even Pollux, who devotes his entire eighth book to legal terminology, mentions them. Neither Plato nor Aristotle, who were both versed in legal history,

[1] Bücheler and Zitelmann, "Das Recht von Gortyn," *Rhein. Mus.*, XL, *Ergänzungsheft*, Comment. by Zitelmann, p. 76.

[2] Ziebarth, *op. cit.*, pp. 40 f.; in Pauly-Wissowa, *s.v.* "Eid"; Gilbert, *Beiträge*, pp. 468 f.; R. Meister, *Berichte der Sächs. Ges. der Wiss.* (Phil.-Hist. Cl.), XLVIII (1896), 35 ff.; Wyse, in Whibley, *Comp. to Greek Studies*[4], p. 467; Glotz, *Solidarité de la famille dans le droit criminel en Grèce*, pp. 288 ff.

[3] *Rhein. Mus.*, LXIII, 559 ff.; cf. Cauer's review, *Woch. f. kl. Phil.*, XXVI, 766.

[4] The word ὀμωμόται, which is preserved in two inscriptions (Collitz-Bechtel, *op. cit.*, 4964, 5092), has often been considered a technical designation for this class of witnesses, and ὀρκομόται (*ibid.*, 4969; Fougères, *Bull. corr. hell.*, XVI, 577) has been interpreted as a variant for ὀμωμόται. But all four inscriptions are fragmentary and unintelligible and it is not possible to make any deductions from them alone. Meister rejects ὀρκομόται as oath-helpers on the ground that this word is used unmistakably of jurors in the Oeanthea-Chaleion inscription (*op. cit.*, p. 579). The nearest approach to a word for the institution is the verb συνεκσομόσαθθαι (Collitz-Bechtel, *op. cit.*, 4986).

has any designation for them. Aristotle makes the following statement in regard to the different kinds of witnesses: *εἰσὶ δὲ αἱ μαρτυρίαι αἱ μὲν περὶ αὐτοῦ αἱ δὲ περὶ ἀμφισβητοῦντος καὶ αἱ μὲν περὶ τοῦ πράγματος αἱ δὲ περὶ τοῦ ἤθους, ὥστε φανερὸν ὅτι οὐδέποτ' ἔστιν ἀπορῆσαι μαρτυρίας χρησίμης.*[1] That is, Aristotle makes a division into witnesses of fact and witnesses to character. But although it is generally admitted that the institution of oath-helpers in the German and English sense was unknown in Athenian law, most scholars have accepted the phrase *αἱ μαρτυρίαι περὶ τοῦ ἤθους* as referring to *Eideshelfer*. But Aristotle is describing the law as it existed in his day. Hence it is not probable that he would discuss an obsolete type of witness. Those who argue that the phrase has reference to oath-helpers use as proof the fact that Aristotle places these witnesses on a par with witnesses of fact (he calls them both *χρησίμη*, i.e., a decision might be based on the evidence of either), but that German *Leumundszeugen*, the counterpart of our familiar character witnesses who testify to the general reputation of a defendant, are never on a par with witnesses of fact. But in this case the analogy with German law is valueless. For English law puts character witnesses on precisely the same plane with witnesses of fact. Furthermore, character evidence, although not quite in the English sense, was well known at Athens and might be admitted even in the Areopagus.[2] It is then inconceivable that Aristotle refers to compurgation which was not known at Athens in his day. That he refers to character evidence is borne out by the following sentence which Meister fails to quote: *εἰ μὴ γὰρ κατὰ τοῦ πράγματος ἢ αὐτῷ ὁμολογουμένης ἢ τῷ ἀμφισβητοῦντι ἐναντίας, ἀλλὰ περὶ τοῦ ἤθους ἢ αὐτοῦ εἰς ἐπιείκειαν ἢ τοῦ ἀμφισβητοῦντος εἰς φαυλότητα.*[3] Obviously there is no indication here of an oath either to a fact or to the truth of an-

[1] *Rhet.* i. 15. 18.

[2] Bonner, *Evidence in Athenian Courts*, pp. 18, 83 f.

[3] Sandys translates: "For if we have no evidence as to the fact, either in agreement with our own side of the case or opposed to that of the adverse party, at all events (we shall be sure to find plenty) as to character, ... to establish, that is, either our own respectability or the opponent's worthlessness."

other man's oath. The witness, regularly unsworn in Athenian practice, simply testifies to the ἐπιείκεια or φαυλότης of the party. It is clear, then, that Aristotle is not only not using a special designation for oath-helpers but is not even speaking of oath-helpers.

Meister[1] recognized two distinct classes of oath-helpers in Greek law: (1) those who swore that the principal's oath was good (this class corresponds precisely to compurgation in English and Germanic law as described above); (2) those who swore the same oath as the principal in support of his contentions (this class is entirely unknown to the English and Germanic systems). The former class need have no knowledge of the fact; the latter must. The oaths consequently are quite different in content, the common feature being that they join the principal in his preliminary oath in denial or affirmation and that in both cases the oaths are final. The ordinary witness, if sworn at all, had no part in the preliminary oath taken by the litigants, but swore to matters within his knowledge which were considered germane to the issue; frequently he had no knowledge of the main issue, the guilt or innocence of the defendant. Still another factor may be noted. In many cases no witnesses could be found to swear that the defendant did not commit the crime with which he was charged. For example, Euxitheus, the defendant in the Herodes murder trial, was the last person seen in company with Herodes.[2] So no one could swear that he was not the murderer.

The problem, then, is to discover if possible whether Class 2 develops from Class 1. Although Meister has recognized the two distinct classes in Greek law, he has failed to consider this question in detail, thus confusing his argument.

Of the examples given by Meister there are only two cases of *Eideshelfer* which correspond to the English and German systems, i.e., relatives who swear to the truth of the defendant's oath. One occurs in an inscription from Egyptian

[1] *Op. cit.*, pp. 579 ff.; cf. Bücheler and Zitelmann, *op. cit.*, p. 76; Ziebarth, *op. cit.*, pp. 40 f.

[2] Antiph. v. 22.

Thebes belonging to the second century B.C.[1] Two brothers, Heracleides and Nechutes, were charged with wounding. They were ordered to take an evidentiary oath to the effect that they themselves did not cause the wound, and did not know who did (this probably means, as Meister suggests, that they were not accomplices). In support of this oath their brothers swear that it is true (*ἀληθῆ τὸν ὅρκον εἶναι*). *ἀληθῆ* is used in the same sense as the German *rein und unmein* and the English "good," that is, it merely expresses the helper's confidence in the principal and implies no knowledge of the facts. The oath-helpers could not have had knowledge of the facts unless the time of the crime was specified and they could prove an alibi for the defendants. This, however, is only incidental. The fact that they swear merely that the oath of the defendants is true proves that they are oath-helpers in the only sense of the term known in German and English law. It is interesting to note that they are the closest relatives of the defendants. Relationship was one of the qualifications for the first type of oath-helper. Apparently the oath of the defendants with their oath-helpers decided the case. If the helpers failed to take it, the defendants were to be brought before the *epistatés* (*ἔρχεσθαι ἐπὶ τὸν ἐπιστάτην*) for trial on the merits of the case.

This form of compurgation is illustrated also by a passage from the *Politics* in which Aristotle, commenting on the absurdity of ancient laws, uses as an illustration a law of Cyme: *ἂν πλῆθός τι παράσχηται μαρτύρων ὁ διώκων τὸν φόνον τῶν αὐτοῦ συγγενῶν, ἔνοχον εἶναι τῷ φόνῳ τὸν φεύγοντα.*[2] The phrase *τῶν αὐτοῦ συγγενῶν* has sometimes been construed as dependent upon *φόνον* and so has been considered to have reference to the universal rule in Greece that only a relative of a murdered man could prosecute the murderer.[3] But if it is joined with *πλῆθος μαρτύρων*, which is the natural interpreta-

[1] Revillout and Wilcken, *Revue égyptologique*, VI, 11; Wilcken, *Griechische Ostraka aus Aegypten und Nubien*, II, 1150. Cf. Meister, *op. cit.*, p. 575.

[2] 1269A; cf. Meister, *op. cit.*, pp. 573 ff.

[3] Glotz, *op. cit.*, pp. 47 ff., 425 ff.

tion,[1] one of the important characteristics of the original *Eideshelfer* would be fulfilled. In any case there is no real difficulty in recognizing oath-helpers in the πλῆθός τι μαρτύρων. It may be objected that there is no mention of an oath, the indispensable feature of the institution. But the objection cannot be sustained. For this is a murder trial and at Athens all witnesses in murder trials were sworn so that Aristotle would scarcely think it necessary to mention the oath which his readers would assume. Aristotle describes them as μάρτυρες, which seems to show that he did not recognize them as oath-helpers. But if he had realized that he was criticizing the institution of oath-helpers, he would not have used the word μάρτυρ, but some circumlocution, since his readers could not have known that he meant oath-helpers. With his knowledge of legal institutions it is remarkable that Aristotle was ignorant of the institution of oath-helpers, but in the face of this passage it is better to admit his ignorance than to make a desperate effort to defend his knowledge.[2]

The fact that stress is put on the quantity also makes for their being oath-helpers. If they were fact witnesses, number would be of comparatively little importance. Reliability, not quantity, is the *desideratum* in testimonial evidence. It is scarcely possible that they could be fact witnesses, for murder is usually committed with the greatest secrecy. The only reason for demanding a certain number of eyewitnesses would be a practice of determining the case without letting the defendant be heard in his own defense. This is just what happens in the case of oath-helpers. If the party produces the required number he wins the case. It is inconceivable that the law required a fixed number of eyewitnesses in order to establish a prima facie case. If they are oath-helpers, the pas-

[1] Cf. Jowett's translation: "At Cumae there is a law about murder, to the effect that if the accuser produce a certain number of witnesses from among his own kinsmen, the accused shall be held guilty." Cf. also Newman, *ad loc.:* "Witnesses from the number of his own kinsmen."

[2] Cf. Wyse (*op. cit.*), who says that Aristotle is wrong. Meister weakens his argument by trying to defend Aristotle.

sage furnishes an illustration of oath-helpers as used on the side of the plaintiff. The number was fixed in court.[1]

These two cases exhaust the Greek instances of *Eideshelfer* as they appear in Germanic and English practice. In the other cases cited by Meister and his predecessors the so-called oath-helpers swear not that the oath is good, but they swear the same oath as the principal. In other words, owing to their knowledge of facts they are able to join the principal in a solemn oath. They thus differ fundamentally also from regular witnesses in that the combination oath, like the ancient evidentiary oath, settled the case. The opponent is not allowed to say a word. The unity and finality of the oath indicate a distinct development of oath-helpers unknown to other systems. All of Meister's examples of this class are taken from the laws of Gortyn.

An alleged case of *Eideshelfer* which has occasioned an enormous amount of discussion is that of the ἐπωμόται, which an alien plaintiff in Oeanthea or Chaleion was allowed to choose under certain conditions:

Αἴ κ' ἀνδιχάζωντι τοὶ ξενοδίκαι, ἐπωμότας ἑλέστω ὁ ξένος ὠπάγων τὰν δίκαν ἔχθος προξένω καὶ ϝιδίω ξένω ἀριστίνδαν, ἐπὶ μὲν ταῖς μναϊαίαις καὶ πλέον, πέντε καὶ δέκ' ἄνδρας, ἐπὶ ταῖς μειόνοις ἐννέ' ἄνδρας.[2]

The word ἐπωμόται has been regarded as referring to additional jurors by many scholars.[3] Buck,[4] Hitzig,[5] and Ott[6] in-

[1] Meister (*op. cit.*, p. 575, n. 1) cites an excellent analogy in a German law to the effect that a plaintiff in a homicide case could with two oath-helpers swear that the defendant was guilty of a murder. Apparently the verdict was based on this oath and the defendant was not heard in his own defense.

[2] Hicks and Hill, *op. cit.*, 44; Tod, *op. cit.*, 34; Collitz-Bechtel, *op. cit.*, 1479.

[3] Oikonomides, *Λοκρικῆς ἀνεκδότου ἐπιγραφῆς διαφώτισις*; Rangabé, *Antiquités helléniques*, 356*b*; Röhl, *Inscrip. Gr. Ant.*, 322; Kirchhoff, *Phil.*, XIII, 1 ff.; Dareste, *REG*, II, 318; Eduard Meyer, *Forschungen zur alten Geschichte*, I, 307; Roberts, *Introduction to Greek Epigraphy*, 232; Dittenberger, *Inscr. Gr. Sept.*, III, 333; Hicks and Hill, *op. cit.* Several of these scholars had expressed their opinions before the idea of oath-helpers in Greek law had become established.

[4] *Greek Dialects*, 56, p. 218.

[5] *Altgriechische Staatsverträge über Rechtshilfe*, pp. 13, 45.

[6] *Op. cit.*, p. 120. It is difficult to discern whether Buck and Hitzig conceive of these sworn men as additional jurors or as an entirely new court. Ott asserts that

terpret the word as "sworn men with judicial functions." A small group of scholars who have argued the case in detail interpret the word as "oath-helpers."[1] Their arguments are as follows: ἐπωμόται cannot mean additional jurors; no instance of a partial jury thus specially selected occurs elsewhere; if the chosen ones are additional judges, who decides whether they are chosen according to the conditions? They cannot be fact witnesses since they are chosen (ἑλέστω).

The last argument is sound. They cannot be witnesses of fact. With regard to the other arguments, in the first place in Greek as in English law,[2] trial by wager of law is often an alternative for trial with witnesses. In any case the oath-helpers are not brought in after the jury has already reached its decision. It is inconceivable that the plaintiff would not be allowed the benefit of oath-helpers from the beginning even if there were fact witnesses. Again, although *Eideshelfer* are admittedly partisans, yet in this case the ἐπωμόται must not include the πρόξενος and ϝίδιος ξένος of the litigant, the only two people whom there would be much possibility of his knowing well. For, by the terms of the treaty, if a man has made a sojourn of more than a month in Oeanthea or Chaleion he must submit to the regular courts and cannot be tried before the ξενοδίκαι. This restriction, which constitutes the most important argument against *Eideshelfer*, is disregarded by both R. Meister and R. M. E. Meister. It is impossible to see why the right to choose fifteen or nine *Eideshelfer* is not just as great or even more of a preference accorded to one side than the right to choose some jurors. R. M. E. Meister argues that if the men are additional jurors they will sit along with the ξενοδίκαι and so there will be no one to decide whether the conditions specified for the choice of them have been complied with or not. This argument is

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the word means merely "jurors" and is not a compound ἐπ-ωμόται, but comes from ἐπόμνυμι, meaning "to swear to a thing."

[1] R. Meister, *op. cit.*, pp. 35 ff.; R. M. E. Meister, *op. cit.*, pp. 561 ff.; Gilbert, *Jahrb. f. cl. Phil.*, Supplbd. XXIII, 468 ff.

[2] Cf. the Theban case, *supra*, pp. 181 f.

quite untenable, for the ξενοδίκαι would naturally decide the matter.

To the fact that there are odd numbers in both cases no importance has been attached by either writer. The numbers are too large for fact witnesses, as has been said. It is also too much to suppose that an alien who had been in the place less than a month could get so many *Eideshelfer*, exclusive, be it observed, of the only two men who could be supposed to know him well, his host and his πρόξενος. Thus Meister's argument against fact witnesses militates against *Eideshelfer* also. But if the ἐπωμόται are considered as a new group of jurors (odd in number, so that there cannot be an equal number of votes on both sides), there is then described by the inscription an extremely fair means of dealing with the case. The plaintiff, an alien, is given a fair deal by being allowed to choose them. His opponent is treated fairly because the citizens chosen by the alien are not likely to be influenced to the disadvantage of their fellow-citizen. There is no objection to this interpretation either from a linguistic or from a legal standpoint. It is interesting to note in connection with this the last part of the same inscription. In a case in which a citizen proceeds against a fellow-citizen in accordance with the terms of the συμβολαί the magistrates are to choose from the worthiest men jurors (ὀρκωμόται), who on oath are to decide the case by a majority decision. However, another treaty cited by Hitzig[1] supports this interpretation. The inscription deals with a treaty between Gortyn and Lato in Crete. In suits between citizens of the two places the Gortynian plaintiff brings action at Lato and vice versa and the plaintiff chooses his own judges (δικαστὰνς ἑλέσθω ὁ ἀδικιόμενος). The situation is precisely the same as that at Oeanthea and Chaleion.

To summarize: There existed in Greece two distinct forms of the institution of oath-helpers: those who swore to their confidence in the oath of the principal (they might or might not have knowledge of the facts of the case) and those who swore a joint oath with the principal to the facts. Together

[1] *Op. cit.*, p. 27. For the text of the decree cf. *Bull. corr. hell.*, XXVII, 219 ff.

with the character witnesses found in Aristotle[1] there are then three types of witnesses who assist the principal otherwise than by merely testifying to the fact. This third class may also, as Class 2, have developed from the original oath-helper. The attitude of both types (i.e., Class 1 and Class 3) toward the litigant is obviously the same, for both have implicit confidence in his honesty. Between the two there is undoubtedly a psychological connection, but only confusion results from failure to recognize the fact that they are not the same. No Greek writer has identified them either explicitly or implicitly. There is no feature that is common to all three types of witnesses. The first two swear in the preliminary oath although they swear to different things. The first and third signify their confidence in the principal, although one swears and the other takes no oath. It is quite reasonable, then, to treat the second and third types as separate developments of the original oath-helper, inasmuch as each type has a point in common with the original oath-helpers.

The procedure followed in connection with the two types of *Eideshelfer* was apparently the same although the content of the two oaths was different. The numbers are much smaller than those as a rule found in the English and German systems. There they might be several hundred in number. But in Greek law they range from one in one part of a case at Gortyn to four in another division of the same case. The extant examples, however, are very few and doubtless larger numbers were often required. Definite numbers are required for specific cases by law. In the laws of Gortyn the number varies with the importance of the individual injured. This tallies with Germanic and English law. They are found on the side both of the defendant and of the plaintiff. As a rule they are chosen by the litigant, but they might be designated by the court. They are found in both civil and criminal suits. In one case the oath includes a solemn curse, and perhaps it always did so as was the case with the earliest type of evidentiary oath.

It was assumed at the beginning of the discussion of the

[1] Cf. *supra*, pp. 180 f.

institution of *Eideshelfer* that it is an outgrowth and strengthened form of the evidentiary oath.[1] This has long been recognized by investigators in the field of Germanic law. But writers on the history of the Greek institution have failed to recognize the connection. A man's own oath which at first had sufficed to clear him without further inquiry gradually came to be felt as insufficient proof of his innocence. So the sworn confidence of his relatives and later of friends was added.[2] Glotz, who treats the institution only as a part of the evolution of family solidarity, explains its development in the following way.[3] He maintains that at first the oath-helpers are relatives of the party and so occupy the same position as avengers of blood. Hence in origin the institution is merely a declaration of family solidarity. The relative who is especially injured becomes the chief avenger and the others are more or less auxiliary. From this comes the fact that only the accuser or the accused ever has oath-helpers to confirm his oath. That is to say, a witness never has an oath-helper to substantiate his statements. The only difficulty with Glotz's solution is the fact that as a usual thing in the earliest stage of the institution oath-helpers are found only on the side of the defendant. Glotz's argument admits of them on both sides from the very beginning, perhaps even as arising on the side of the avenger or plaintiff. It is not impossible, however, partially to reconcile the two views given above. Perhaps at first a man was allowed to clear himself by an oath. This is felt as insufficient. Then family solidarity steps in and the relatives support the defendant. That is, family solidarity explains the fact that at first relatives are always the oath-helpers. This limits the institution in its beginnings to the defendant's side, or to what Glotz would designate the passive solidarity of the family.

The remainder of Glotz's argument is undoubtedly correct. When families of the γένος are split apart, oath-helpers

[1] *Supra*, p. 175.

[2] Schröder, *op. cit.*, p. 83; Pollock and Maitland, *op. cit.*, II, 600; Grimm, *op. cit.*, II, 495 ff.

[3] *Op. cit.*, pp. 288 ff.

are chosen in one of two ways. They may be limited to the closest relatives without regard to number or the number may be restricted without specification as to the degree of relationship. The next stage is when the origin is forgotten and neighbors and friends are called on.

But whatever may have been its origin, the psychology of the institution is perfectly clear—the partisan spirit which continued to be its dominant characteristic as long as it lasted. Gilbert suggests[1] that it arose out of such situations as the trial scene depicted on the shield of Achilles,[2] where, after describing the dispute, the poet adds *λαοὶ δ' ἀμφοτέροισιν ἐπήπυον, ἀμφὶς ἀρωγοί.* To say that it had its origin in such a situation is slightly misleading, as it does not account for the fact that originally the oath-helpers were relatives. But the argument that there is the same feeling, that is, the partisan spirit, in both is quite true. Glotz[3] objects to the use of this passage in the evolution of the institution on the ground that the oath-helper always appears in the character of a subordinate, but that *ἀρωγός* implies a protector rather than a supporter. Besides, the *ἀρωγοί* of Homer have no practical influence, as they are not really participants in the trial. Of course, his contention is correct that they are not really oath-helpers, but the word has such a definite partisan signification that it is not going too far to say that the psychology back of the Homeric scene is the same as that behind compurgation. Two other passages are of interest in determining the meaning of *ἀρωγός*.

> *ἀλλ' ἄγετ', Ἀργείων ἡγήτορες ἠδὲ μέδοντες,*
> *ἐς μέσον ἀμφοτέροισι δικάσσατε, μηδ' ἐπ' ἀρωγῇ,*
> *μήποτέ τις εἴπῃσιν Ἀχαιῶν χαλκοχιτώνων.*[4]

There is no protection implied here; it is mere partiality.

> *ὑμεῖς δὲ μαρτύριά τε καὶ τεκμήρια*
> *καλεῖσθ', ἀρωγὰ τῆς δίκης ὁρκώματα.*[5]

[1] *Jahrb. f. cl. Phil.*, Supplbd. XXIII, 469, n. 1.

[2] *Il.* xviii. 497 ff.; cf. esp. l. 502.

[3] *Op. cit.*, pp. 292 f.

[4] *Il.* xxiii. 573 ff.

[5] Aesch. *Eumen.* 485 f.

Here the idea of partisanship is not as distinct as that of mere aid.

A false oath could not be punished by legal process. Such punishment was left to the gods. It is natural that no action should be brought for an evidentiary oath, for it was taken as the result of a challenge and the other party agreed to accept it as final. Apparently very little account was taken of the party oaths. One of these was almost always false. The false evidence of witnesses who gave testimony under oath could be dealt with by *δίκη ψευδομαρτυρίων*.[1] In the case of the promissory oath there were various ways of dealing with the problem. For instance, an official who was guilty of misconduct in office was not tried for having sworn a false oath, but for malfeasance in office.

There are found in Athenian law a few kinds of oaths which seem to be survivals of the institution of oath-helpers. The survival of compurgation in the procedure of *διαμαρτυρία* has been pointed out.[2] In cases before the Areopagus no person could give evidence unless at the beginning of the trial he had taken an oath either as to the innocence or as to the guilt of the defendant.[3] In this oath we see the development of the oath-helper into the regular witness. He still swears the preliminary oath along with his principal, but later in the case he presents his testimony just as an ordinary witness of fact. So his oath is not final. One step farther and the preliminary oath with the principal would be abandoned and nothing would be left but the witness of fact.

Another oath which is analogous to the oath of oath-helpers is that which was sworn preliminary to a murder trial to the relationship of the prosecutor to the murdered man. This is the same oath as that which the principal swears, and it is sworn along with the principal. With the joint preliminary oath, however, the analogy ends, for it was not final. Even women and children, as has been argued above, were allowed

[1] Cf. *infra*, pp. 261 ff.

[2] Cf. *supra*, pp. 82 f.

[3] Lysias iv. 4; Bonner, *Evidence in Athenian Courts*, pp. 28 ff.; Leisi, *op. cit.*, p. 57; *supra*, pp. 166 f.; Latte, *op. cit.*, p. 32.

to take oath to establish the relationship of the prosecutor to the deceased.[1]

The voluntary oath which might be offered in defense of a litigant has in common with oath-helpers sworn confidence in a man.[2] This oath seems generally to have been taken by relatives.[3]

There are then in Attica a few survivals of the institution. Meister, failing to see these survivals, asserted:

> In Attika hat sich keine Spur von ihnen gefunden, wie leicht erklärlich ist: Eideshelfer sind auf kleinere Verhältnisse zugeschnitten, wo einer den anderen kennt; in der grossen Stadt und bei entwickelten Verkehrsverhältnissen können sie nicht vorkommen.[4]

It is interesting to note that in England, one of the greatest commercial countries in the world, the institution was not abolished until 1833.

[1] Cf. *infra*, pp. 221 f.

[2] Ziebarth, *op. cit.*, p. 41; cf. Meier-Schömann-Lipsius, *Der Attische Process*, p. 899, n. 379, for plentiful examples of the oath.

[3] Ziebarth gives an illustration of this oath which Meister (*op. cit.*, p. 578) has conclusively shown to be false. For the text of the inscription see Collitz-Bechtel, *op. cit.*, 1478; Dareste-Haussoulier-Reinach, *op. cit.*, pp. 180 ff.; Michel, *Recueil d'inscriptions grecques*, 285.

[4] *Op. cit.*, p. 581.

CHAPTER VIII

HOMICIDE

In the discussion of the Athenian homicide courts great prominence has been given to the influence of pollution on homicide procedure.[1] The idea of pollution often tends to become confused with the doctrine of ποινή, or the recompense which was due the murdered man. The desire for vengeance was very active from the earliest times, but the pollution doctrine, it is now conceded, did not exist in the Homeric period.[2] In that period homicide was entirely the concern of the relatives of the slain man and might be dealt with in several ways: the homicide, in fear of being slain, might go into exile; or he might be caught before he could escape and consequently lose his life; or he might be able to effect a settlement with the family of his victim. Homer furnishes abundant examples of each of these procedures. It is clear that in none of the cases was the slayer of interest to anyone except the relatives. A homicide who had fled from his native land was hospitably received in other lands and suffered no deprivations other than loss of native land, for the slayer was beyond the vengeance of his victim's relatives. On the other hand, if he managed while remaining in his own land to appease the relatives with a satisfactory payment, he was allowed to stay without being molested and to remain in possession of his property and privileges. The punishment exacted from the slayer served both as a satisfaction to the family for its loss and also as recompense to the slain man. There is no suggestion that the slayer was polluted or that his presence had any effect on the state or on his associates. It was, like most early legal transactions, a matter solely for

[1] The procedure in homicide trials has been discussed at length *supra*, I, 110 ff. There are, however, disputed details of homicide practice which call for fuller discussion. An attempt is made here to set forth the various arguments involved.

[2] Cf. *supra*, I, 15 f., 53 ff.

the criminal and the family of the victim. The slaying of kin, on the other hand, met with utter condemnation in the Homeric period just as it did in later times.[1]

It is interesting to see how the Homeric attitude toward homicide is reflected in the historical period, when new ideas about homicide had developed and the state had taken over the actual prosecution. The *poiné* principle remained very active. In fact, the dying man is often represented as demanding *poiné*.[2] But the relatives of the victim might no longer kill the homicide if he remained in the state. Although the initiation of the prosecution still rested primarily with the relatives, the homicide had to be dealt with through a court. This innovation was obviously calculated to end blood feud.

> If a man obtain a conviction for murder, even then he gets no power over the condemned, who for punishment is given up to the laws and to persons charged with that office; he may behold the condemned suffering the penalty which the law imposes, but nothing further.[3]

In this witnessing of the execution Lipsius[4] sees a survival of the old blood vengeance. So, although the state had imposed certain restrictions, the relatives and not the state continued to be considered the injured parties in homicide. The homicide might be slain only if, having been interdicted, or having been tried and condemned, he then entered the forbidden places. And in this case not only the relatives, but anybody, might either slay or arrest him. Here the pollution principle is seen to be at work. But so far as the relatives are concerned, the idea back of all this is *poiné* or compensation.[5] When it became a matter of pollution anyone could act.

As in the Homeric period so in later times exile was not

[1] Cf. *infra*, pp. 201 f., 216 f. The question of homicide in Homer has been treated at great length by many writers: cf. *supra*, I, 15 ff.; Philippi, *Der Areopag und die Epheten*, pp. 3 ff.; Glotz, *La Solidarité de la famille dans le droit criminel en Grèce*, pp. 47–222; Lipsius, *Das Attische Recht*, pp. 6 ff.; Treston, *Poiné*, pp. 11–26; Calhoun, *Growth of Criminal Law in Ancient Greece*, pp. 15–24.

[2] Cf. *infra*, pp. 195 f. [3] Demos. xxiii. 69. [4] *Op. cit.*, p. 603.

[5] Even the procedure before the Prytaneum must be viewed as an attempt to secure recompense for the deceased rather than to rid the country of polluted objects.

purificatory. It doubtless was, to begin with, just a means of self-preservation for the homicide. It became, through lack of other means, a means of securing *poiné* for the murdered man. The exiled homicide seems to have been considered polluted in other cities in historical times no more than in the Homeric period, although a homicide is occasionally represented as begging for purification from his foreign host.[1]

Pardon (*αἴδεσις*) and a return from exile could be granted the convicted homicide only by relatives of the slain man or, in cases where there were no relatives, by members of the phratry.[2] This shows that the object of the exile was *poiné*, not purification. Otherwise, the state religion would have settled the term of exile and would have awarded the pardon and the family would not have been concerned. As it is, the state could do nothing about the pardon. In Homer *ἀειφυγία* was apparently the rule, there being no distinction between different kinds of homicide. In historical times only premeditated homicide admitted of no pardon.[3] An interesting question with regard to return from exile is raised by the procedure in Phreatto. It was not primarily because he was polluted that the homicide was not allowed to land; he had not completed the *poiné* and had not secured a pardon from the relatives.

That the purpose of exile for homicide was for *poiné* is very clearly shown by a passage of Demosthenes[4] in which Demosthenes explains the purpose of the law which provided that a convicted homicide in exile should not be molested as long as he kept away from the border market, the games, and the Amphictyonic sacrifices.

[1] Cf. Adrastus in Herod. i. 35 ff.; Jason and Medea in Apol. Rhod. iv. 693 ff.; Orestes in Aesch. *Eumen.* 448 ff. It is noteworthy that in each of these cases the suppliant had slain a blood relative—a horrible crime even in the Homeric period. Cf. *Il.* ix. 458 of Phoenix:

τὸν μὲν ἐγὼ βούλευσα κατακτάμεν ὀξέϊ χαλκῷ·
ἀλλά τις ἀθανάτων παῦσεν χόλον, ὅς ῥ' ἐνὶ θυμῷ
δήμου θῆκε φάτιν καὶ ὀνείδεα πόλλ' ἀνθρώπων,
ὡς μὴ πατροφόνος μετ' Ἀχαιοῖσιν καλεοίμην.

This passage is suspected and is omitted from some texts.

[2] *IG*², I, 115. [3] *Ibid.* [4] xxiii. 37 ff.

The legislator thought it only right that the murderer should have the power of removing from the land of the murdered man to a land where none has been injured and of dwelling there in security. So he made his law to provide for this and also to prevent the endless avenging of misfortunes. In order to do this he banished the culprit from everything in which the deceased in his lifetime had a part.

There is no idea of pollution here.

Thus it can be seen that in regard to exile the state did not interfere with *poiné* for homicide.[1] The family, not the state, gave pardon. Homicides were always excluded from amnesty laws.[2]

The idea of *poiné* is emphasized in the passages which represent the dying man as enjoining it upon the surviving relatives to secure vengeance for him. A client of Antiphon[3] tells how his father before he died told him to get vengeance for him for his death at the hands of his wife. It is interesting to note that in this case the speaker says that if men who are mortally wounded can do so before they die, they summon their relatives and friends and ask them to exact vengeance. If this is impossible they write letters and summon their slaves and call them to witness at whose hands they died. The important idea in this whole passage is recompense for the slain man. There is no mention of pollution. Another case is that of Agoratus. Dionysodorus summoned his brother and wife and brother-in-law to prison before he died and charged them and all his friends to punish as a murderer Agoratus who had given false information which led to his condemnation. Dionysodorus also admonished his wife to charge their unborn child to take vengeance on Agoratus.[4] In this passage Treston translates the phrase τοῖς φίλοις by "all his kindred." It is more natural to understand the words as referring not to relatives but to friends. Two explanations may be suggested for the inclusion of friends. They may have

[1] For the question of a legal term of exile cf. *infra*, pp. 229 ff.

[2] For the text of the amnesty law cf. Gertrude Smith, "The Prytaneum in the Athenian Amnesty Law," *CP*, XVI, 345; for the literature on the subject of the law cf. Busolt, *Griech. Gesch.*, II, 159, n. 1.

[3] i. 29 f.

[4] Lysias xiii. 42.

been included, because if members of the phratry they could join in the prosecution. Or they may have been included as witnesses of the dying man's request. There is an excellent statement in Antiphon about the expectation of the deceased that he would receive *poiné*.[1]

On the other hand, a man fatally wounded might forgive his slayer and release him from guilt and forbid his relatives to take vengeance. In fact, if he had once given release the relatives were barred from further action. Demosthenes is the chief authority on this subject.[2] He plainly states that in case a slain man, before dying, has released his slayer it is not lawful for his relatives to prosecute. The man who has been released by his victim is at once absolved from all penal consequences. The reference is plainly to a release from any sort of homicide, although the preceding passage is concerned only with unpremeditated homicide. Treston[3] agrees that the reference is to any kind of homicide, but Müller[4] thinks it refers to manslaughter only. According to Lipsius,[5] this passage proves that the premeditated homicide could be pardoned only by the murdered man before he died; his relatives could not do it. Lipsius thus would apparently agree that the passage refers to any kind of homicide. In this case again there is no question of pollution. The dying man by giving release to the guilty man declared that he wished no *poiné*. So apparently nothing further was ever done in such cases. Treston[6] says that the homicide was completely freed. Not even a charge of involuntary homicide could be brought. For the dying man's release did not merely reduce the charge to one of justifiable or accidental slaying, but it furnished full pardon.

The question of the legality of the practice of giving material compensation or blood money to the family of the deceased in the historical period has been much discussed.

[1] ii. δ. 11. In ii. γ. 10 the murdered man is represented as being a suppliant for vengeance.

[2] xxxvii. 59.

[3] *Op. cit.*, p. 176.

[4] *Eumenides*, p. 127.

[5] *Op. cit.*, p. 604.

[6] *Op. cit.*, p. 177.

Because of the fact that such practice was well established in the Homeric period and that the family continued to be regarded as the party chiefly concerned in dealing with homicide, some scholars have argued that the *wergeld* system continued to be thoroughly recognized in fifth- and fourth-century Athens. The ancient references to the subject are not conclusive.[1] In Demosthenes,[2] Theocrines is criticized by the speaker for accepting a sum of money from his brother's slayers and dropping further prosecution. The passage, however, is not conclusive, for Theocrines' act in so doing may have been legal and his condemnation by the speaker for such action mere rhetoric. A puzzling passage occurs in another speech of Demosthenes:[3]

> This, I presume, you will all acknowledge, that other people have suffered wrongs before now, of a more grievous nature than pecuniary wrongs; (for example, unintentional homicides, and outrages on what is sacred, and many similar things, are perpetrated;) yet in all these cases the injured parties are finally and conclusively barred, when they have come to a settlement and given release [ἀλλ' ὅμως ἁπάντων τούτων ὅρος καὶ λύσις τοῖς παθοῦσι τέτακται τὸ πεισθέντας ἀφεῖναι]. This rule of justice is so universally binding that when a man has convicted another of involuntary[4] homicide and clearly proved him to be "polluted," yet if he afterwards condones the crime and "releases" him, he has no longer the right to force the same person into exile.

It is possible but quite unlikely that the word πεισθέντας should refer to material compensation.[5]

A third passage used by Glotz in support of his argument that private settlement was legal, unfortunately for his theory, does not refer to homicide. It is the famous passage in the *Frogs* of Aristophanes[6] where Aeschylus' verse ἥκω γὰρ

[1] The practice of giving material compensation for homicide is mentioned by Harpocration, *s.v.* ὑποφόνια, and is quoted from Dinarchus Κατὰ Καλλισθένους and Κατὰ Φορμισίου. But in our ignorance of how ὑποφόνια is there mentioned no conclusion can be drawn as to the legality of the practice.

[2] lviii. 28.

[3] xxxvii. 58; cf. xxxviii. 21 ff.

[4] Kennedy, reading ἑκουσίου,—an emendation of Reiske—translates "intentional." The Oxford and Teubner texts read ἀκουσίου.

[5] Cf. Paley and Sandys, *Select Private Orations of Demosthenes*, I, 147, and Dareste, *Les Plaidoyers Civils de Démosthène*, I, 271.

[6] 1154–68.

ἐς γῆν τήνδε καὶ κατέρχομαι is attacked by Euripides on the ground of redundancy. Euripides argues that κατέρχομαι cannot be used of Orestes because Orestes came back secretly without having duly appeased those who had authority to permit his return (λάθρα γὰρ ἦλθεν, οὐ πιθὼν τοὺς κυρίους). But the Aeschylean passage to which Euripides is referring occurs at the beginning of the *Choephoroi*[1] when Orestes is returning from Phocis and before the murder of his mother. The passage has nothing to do with a return from exile for homicide.

On the basis of these passages Glotz[2] holds that even in case of murder private settlement without trial was legal in historical Athens. Philippi, on the other hand, argues[3] that private settlement was illegal and that it is absurd to think the penalty for homicide could be paid with money. After a searching study of the above-mentioned passages and of the arguments of Glotz, Treston,[4] on the basis of his earlier argument that the doctrine of pollution was incompatible with any further continuation of the *wergeld* system,[5] reaches the following plausible conclusion. Private settlement was permitted by law or custom whenever a release had been formally granted by the victim before death or, in the absence of a charge, could be assumed. Otherwise private settlement was a sin, a religious quasi-criminal offense. Hence it was legally invalid and the offender was liable to prosecution.[6]

There is abundant evidence of the persistence of the doctrine of *poiné* through all periods of Greek history. And this principle explains fully why originally the relatives alone are

[1] 3. [2] *Op. cit.*, p. 315. [3] *Op. cit.*, pp. 148 f.

[4] *Op. cit.*, pp. 173 ff. *et passim.* [5] *Ibid.*, p. 123.

[6] Cf. Dareste, *Les Plaidoyers civils de Démosthène*, II, 140, n. 24, who admits "transaction" for earlier times but says that in the age of Demosthenes "la vieille tradition commençait à n'être plus comprise, et d'autres idées se faisaient jour." Beauchet (*Histoire du droit privé*, I, 15) argues that the murderer can oftentimes appease the relatives by paying blood money, corresponding to the *wergeld* of the ancient Germans. Busolt-Swoboda (*Griech. Staatsk.*, p. 531) asserts that the receiving of money for the purchase of blood guilt was forbidden. Hermann-Thumser (*Lehrb. der griech. Staatsalt.*, I, 357) says that only in unpremeditated homicide could the relatives forego legal procedure and content themselves with a money payment.

concerned in homicide and continue to be the chief actors in homicide cases. But, although it does not appear at all in the Homeric period, the doctrine of pollution must have appeared very shortly thereafter in homicide, and it had considerable effect on homicide procedure.[1] The effect of pollution is a favorite talking-point on the part of the orators, and this very fact may have given undue emphasis to the importance of pollution.[2] After trying to have Demosthenes charged with murder, Midias made no objection to his participation in various events.[3] This indicates to Demosthenes that Midias did not think him really guilty of homicide. Again in the speech on the murder of Herodes, Euxitheus, the defendant, says that often the presence of people with unclean hands has wrecked a ship. His own innocence is proved, however, by the fact that whenever he was present voyages were fair and sacrifices were good.[4] But even the fear of pollution could not bring about a situation which allowed others than the family and perhaps the phratry members of the victim to initiate a prosecution for homicide before one of the homicide courts, and there are indications that a man who had committed homicide was not legally considered polluted until the relatives of the slain had pronounced a formal interdict against him. It is not to be supposed in the first speech of Antiphon that the stepmother, although her husband had begged for vengeance against her, had been considered polluted during all the years before the son reached his majority and was able to prosecute. And again in Antiphon vi the choregus makes a great deal of the point that his prosecutors associated with him between the time of the death of the boy and the bringing of the accusation, thus indicating his freedom from pollution, even in the eyes of the relatives of the victim. Furthermore, in this case the *basileus* refused to accept the case for trial because his

[1] Treston (*op. cit.*, p. 159) well says that Athenian homicide laws are a combination of clan traditions and religious influence from Delphi.

[2] In the tetralogies Antiphon warns the jurors that by wrongful acquittal they will involve themselves in pollution (ii. *α*. 3; iii. *γ*. 11; ii. *γ*. 10).

[3] Demos. xxi. 114.

[4] Antiph. v. 82 ff.

term of office was too near its end. There was apparently, then, no ban against the murderer until the king archon had accepted the case for trial and the interdict had been pronounced. In this case the choregus went ahead with his lawsuits, the very thing which his opponents were trying to prevent by bringing the homicide charge, and won his case.

In the Agoratus case the suit was not entered until several years after the alleged offense. Agoratus was not, in the meantime, banned from various pursuits. It may be argued here that this is not primarily a homicide case. But Dionysodorus had enjoined it upon his relatives and friends to get vengeance for his death on Agoratus as his slayer. And although Agoratus was not banned from public places and was not officially polluted, yet in the minds of people in general he was considered a murderer. He joined the group at Phyle and he also joined the procession of the Peiraeus party to the citadel. His legal right to do so is apparently unquestioned. But the men refused to associate with him, or even to speak to him, on the ground that he was a known murderer.[1] He was exceedingly roughly treated by the entire group. At Phyle they would even have put him to death if the general had not intervened. Agoratus was very well known and had been instrumental in the deaths of many men of the democratic party. The aversion to him is then to be explained not only by the fact that he was a murderer but also by the fact that he was a foe of the democratic party who had later sought to get into the good graces of the democratic party when it came back into power. The argument, then, that he was polluted and hence was avoided is largely rhetorical. He was an object of the same hatred which fell upon the Thirty.

But once the interdict was pronounced, the accused was considered polluted and he was barred from public places. This does not mean that he did not continue to live at home and to go on with his private business so long as it did not concern the state or take him into public places from which he was banned by the interdict. The whole matter of pollution in homicide looks like a sort of legalized pollution which

[1] Lysias xiii. 77 ff.

was foisted upon homicide procedure by religion for various reasons. It had considerable to do with the forms of the procedure, but very little to do with the punishment.

The slaying of kindred must be treated separately, for the spilling of kindred blood even from the earliest times was looked upon with horror.[1] The feeling which is represented by the tragedians against Orestes as a matricide is older than the doctrine of pollution attaching to anyone who spilled human blood. For example, Phoenix, in telling his story to Achilles, explains that public opinion and the reproaches of men who would call him parricide restrained him from slaying his father.[2] In the Homeric period, then, murder of kin not only brought about the exile of the slayer just as other homicide did but as a sin against one's own clan it also carried with it a social stigma which does not seem to have been the case with other homicide. This is noticed also in the case of the slaying of a guest or of one who has a claim upon the hospitality of another.[3] The laws of the family and of hospitality forbade slaying within the group, although the slayer of kin, like any other slayer, might be granted release by his victim. This feeling that kin murder is far worse than the slaying of one outside the group persists in the stories of Greek mythology and elsewhere. The story of Adrastus in Herodotus[4] il-

[1] The question has been raised as to whether, if an infant was exposed and died, any pollution resulted to those who were responsible for the exposure. It is now generally admitted that although infanticide was not forbidden by law, yet it was practiced very rarely, if at all, in fifth- and fourth-century Athens. Cf. Glotz, in Darem.-Saglio, *s.v.* "Expositio"; Van Hook, *TAPA*, LI, 144 f.; Bolkestein, *CP*, XVII, 222 ff.; Gomme, *The Population of Athens in the 5th and 4th Centuries B.C.*, pp. 75 ff. Nowhere, however, is the practice condemned even by philosophers. It was viewed as a matter which concerned only the family. The father of the dead child is the only one to bring a charge, and he is responsible for the death. The state is silent. Nowhere is there any suggestion of pollution. This is further indication of the comparatively small emphasis which was placed on pollution.

[2] *Il.* ix. 459 ff.; cf. *supra*, p. 194, n. 1; *supra*, I, 16 f.

[3] Cf. the case of Eumaeus, who refuses Odysseus' wager to kill him if he is found not to have told the truth (*Od.* xiv. 402 ff.; *supra*, I, 16). In like manner Glaucus and Diomedes refuse to fight with each other when they discover that they are hereditary guest-friends (*Il.* vi. 119 ff.).

[4] i. 35 ff.

lustrates the point. Although it is told of a non-Greek, yet it is entirely Greek in feeling. Adrastus had killed his brother, and although the act was involuntary (ἀέκων), yet he had been banished by his father. He afterward, again by an involuntary act, slew the son of Croesus who was both his purifier and his host. His horror at his act was so great that he slew himself upon the tomb of Croesus' son. Such a feeling would have been unthinkable except in the case of kin murder or murder of a guest-friend.

There are references to special atonement for kin murder. For example, Theseus is said to have established the Isthmian festival in atonement for the slaying of Sciron, although Sciron was a great rascal who richly deserved killing.[1] In this case Plutarch specifically says that the atonement was made because it was kin murder (διὰ τὴν συγγένειαν). But a heavy atonement might be exacted for the slaying of one who was not a kinsman. In recounting the story of the slaying of Iphitus by Heracles, Plutarch says that Heracles' slavery to Omphale was atonement for this murder. Iphitus was brother to Iole whom Heracles loved.[2]

It would seem from Antiphon[3] that any alleged homicide had a right to go into exile after he had made his first defense speech. The speaker there says that the privilege is granted ἅπασι. This privilege is mentioned also by Demosthenes.[4] But a curious passage in Pollux, in which there is unfortunately text difficulty, according to one text states that flight was possible except in cases of parricide.[5] It is difficult to understand the source of this statement, for it does not seem likely that the murderer of kin would have been refused this privilege.

There are, then, two elements which are of great importance and which constantly occur in the references to homi-

[1] Plut. *Theseus* xxv.

[2] *Ibid.*, vi; cf. Apollodorus ii. 6. 2 f.; *Od.* xxi. 23 ff.; Soph. *Trach.* 270 ff.

[3] v. 13. [4] xxiii. 69.

[5] viii. 117 (Bethe): μετὰ δὲ τὸν πρότερον λόγον ἐξῆν φυγεῖν [πλὴν] εἴ τις γονέας εἴη ἀπεκτονώς.

cide. There is the *poiné* which belongs to the slain man and which his relatives must secure for him, and there is the pollution which attaches to the slayer. In the case of premeditated homicide the offense was considered so great that it admitted of no leniency. Either the death or the lifelong exile of the slayer was necessary as a *poiné* for his victim. So here there is no question of purification in his own land, for *aidesis*[1] was impossible unless granted by the victim and there was no reconciliation. In cases of unpremeditated homicide after the homicide had completed the *poiné* he underwent ceremonial purification on returning to his own land.[2]

With regard to justifiable homicide there has been much dispute as to whether or not the slayer was considered polluted and therefore had to undergo rites of purification. It is certain that no *poiné* was involved. In the laws of Draco it is expressly stated[3] that if a man in self-defense kills another who is unjustly carrying off his property by force there shall be no punishment (*νηποινεὶ τεθνάναι*). That is to say, the slain man has no claim on *poiné*. In like manner in the decree of Demophantus[4] it is declared that if anyone overthrows the democracy or holds any office when the democracy has been overthrown, he is to be considered an enemy of the Athenians and may be slain *νηποινεί*. In accordance with a law of Solon cited in Demosthenes[5] it is permissible to slay or to wound or to bring before the Eleven by *apagogé* a thief by night. Likewise the slayer of an opponent in the games is not a wrongdoer.[6] Also death in war brings no guilt to the slayer and a man who slew an adulterer caught with his wife or mother or sister or daughter or concubine was not liable to punishment.[7] Further, there was a law that if a person died while being treated by a physician the physician should not be considered a murderer.[8] These provisions are attributed, some to Solon,

[1] Demos. xxi. 43; cf. Philippi, *op. cit.*, p. 143.

[2] Demos. xxiii. 72. [3] *IG*², I, 115, ll. 37 f.

[4] Antiph. i. 96; cf. Bolkestein, *Ὅσιος en Εὐσεβής* (Amsterdam, 1936), p. 93.

[5] xxiv. 113. [6] Demos. xxiii. 54. [7] Lysias i.

[8] Antiph. iv. γ. 5: *ὁ μὲν ἰατρὸς οὐ φονεὺς αὐτοῦ ἐστιν, ὁ γὰρ νόμος ἀπολύει αὐτόν.*

some to Draco. It seems clear that there were laws which specified certain kinds of slaying which were considered justifiable and which involved no punishment, i.e., the dead man did not deserve and could not expect *poiné*.

Plato enumerates as not liable to punishment a list of homicides similar to that which is found in the orators.[1] It is permissible to kill: (1) the thief by night; (2) the footpad whom one kills in self-defense; (3) anyone who forces a woman or a boy in love; (4) the adulterer; (5) anyone whom one kills in defense of father, mother, children, brothers, or mother of his own children. Elsewhere Plato mentions accidental deaths in games and contests or in war or practice for war and the death of a man while under a physician's care as not being liable to punishment.[2]

From the foregoing examples it is quite clear that there were certain kinds of homicide which were viewed as legitimate. But the question still remains and has been much debated as to whether these homicides, although they involved no punishment for the slayer, did nevertheless bring pollution upon him which necessitated a ceremonial purification. Was it always necessary to undergo purificatory rites when one had shed human blood, no matter what the provocation or the intent?

It is reasonable to suppose that the physician may be eliminated. He has done nothing to further the death of the patient, and, in fact, he has presumably done everything in his power to save the patient's life. He can in no way be considered polluted. Yet the Athenians thought it necessary to protect him by law from the possibility of being attacked as a homicide. The passage seems quite specific. He is not a φονεύς.

Very frequently in the orators the word καθαρός or some equivalent expression is found applied to men who have committed justifiable or accidental homicide. For instance,

[1] *Laws* 874B–C.

[2] *Ibid.* 865A f. For a list of crimes for which it was legal to slay cf. Kahrstedt, *Studien zum öffentlichen Recht Athens*, Teil I: "Staatsgebiet und Staatsangehörige in Athen," p. 162.

in the passage cited above from Andocides[1] the slayer of a man who attempted to overthrow the government is declared ὅσιος and εὐαγής. Likewise in Demosthenes[2] the man who by mistake kills a friend in war is declared καθαρός. So also in Lycurgus[3] the slayer of the traitor to the government is pronounced καθαρός. And Plato uses this term of justifiable homicide.[4] The question is whether καθαρός and its apparent synonyms ὅσιος and εὐαγής mean merely that the slayer was free from guilt or whether they mean that in addition to freedom from guilt he could also dispense with ceremonial purification. Drerup argues that any kind of homicide involved pollution,[5] and according to Philippi's argument[6] καθαρός does not mean that the justifiable homicide was excused from a religious-symbolic purification. Anyone who shed human blood was impure and must undergo purification. Philippi cites the analogy of the purification of Apollo after the slaying of the dragon, and, further, the analogy of Plato[7] who stipulates that the one who kills accidentally in contests or in war shall be καθαρός after he has been purified by the Delphic law governing such matters (καθαρθεὶς κατὰ τὸν ἐκ Δελφῶν κομισθέντα περὶ τούτων νόμον). Philippi reaches the conclusion that καθαρός as it appears in the orators is used in a juristic, not a religious, sense, and is used as the opposite of μὴ καθαρὸς τὰς χεῖρας φόνου. Purification, then, was not abandoned, although atonement had no part in δίκαιος φόνος. Although the dead man and his relatives are prevented by law from seeking atonement, still the person of the slayer must be cleansed by purification. Gilbert[8] likewise asserts that anyone who had shed human blood was unclean and that there-

[1] i. 96; cf. καθαρὸς τὰς χεῖρας (i. 95).

[2] xx. 158; xxiii. 55. [3] i. 125. [4] *Laws* 874B–C.

[5] *Jahrb. f. cl. Philol.*, Supplbd. XXVII, 282. Drerup comments on the inexactness of the phrase φόνος δίκαιος, for the emphasis is always on the fact that homicide under certain circumstances is not punishable and the technical term for this is νηποινεὶ τεθνάναι (Demos. xxiii. 60).

[6] *Op. cit.*, pp. 62 f. Cf. Hermann, *Staatsalt.* § 104. 15, 16; Schoemann-Lipsius, *Gr. Alt.*, II[4], 364; Maetzner, on Lycurg. i. 125.

[7] *Laws* 865A f. [8] *Const. Antiq.*, p. 387.

fore even one who had committed justifiable homicide had to undergo purification. Lipsius[1] states that the fact that justifiable homicide was not punishable does not mean that religious purification was dispensed with. He points out that Draco's law says only that such homicide shall not be punished. It does not say that the slayer shall be καθαρός. Taking up the use of καθαρός in the orators, Lipsius expresses the opinion that the belief in pollution and the indispensability of purification had weakened very much and that in practice the purification was omitted. Treston,[2] basing his statement on Plato, asserts that purgation in historical Greece was required of the perpetrators of justifiable homicide. This, in his opinion, confirms his own view that homicide purgation was a sacred and solemn symbol of reconciliation between the slayer and his native gods rather than a placation of ghosts or an expiation offered to the gods. It symbolizes the reinstatement of the slayer in society.

It is very difficult to decide this matter. As the passages stand it is tempting to interpret them as meaning that the justifiable homicide is without pollution and that his pure state is emphasized, particularly in the passage of Andocides, by the three words καθαρός, εὐαγής, ὅσιος, all of which could easily be understood to refer to absence of pollution. In the Andocides passage this is especially tempting because the contrast of the condition of the slayer and the slain is emphasized. The traitor is to be allowed to be killed νηποινεί, i.e., he can expect no vengeance (the customary privilege of the slain) in the form of the punishment of the slayer. The slayer, on the other hand, is not subject to the usual disability of the slayer, i.e., he suffers no punishment and is subject to no pollution. In fact, the decree contains an oath in which the Athenians swear that they will consider ὅσιος in the sight of the gods (πρὸς θεῶν καὶ δαιμόνων) anyone who kills a man who has a part in an attempt to overthrow the democracy. This phrase does not seem possible if the slayer is still to be considered polluted and in need of ceremonial purification. Interesting as this suggestion is, it must however re-

[1] *Op. cit.*, p. 618. [2] *Op. cit.*, p. 153.

main a mere suggestion. The word καθαρός can mean either "without legal guilt" or "unpolluted." Conservative religion may have continued to insist on purification whenever blood was spilled, but if this is the case, Lipsius must undoubtedly be correct in insisting that the formality of purification ceremonies was often dispensed with, so that for all practical purposes καθαρός as used in the orators does mean "unpolluted." Certainly failure to perform such rites would have had no influence on the position of the justifiable homicide in society since law proclaimed him guiltless. In many cases of justifiable homicide there can have been no trial at all. It is inconceivable in many cases that a man who killed a traitor would be tried; and so with many other types of homicide which the lawgiver declared justifiable or accidental. This fits in with the general thesis expressed above that at present too much prominence is given to the pollution doctrine in homicide. The *poiné* doctrine, which was of great significance before the pollution doctrine appeared, remained of paramount importance throughout the history of the Athenian homicide courts. It is very doubtful whether much attention would be paid to pollution if the law had once declared that a particular type of homicide was undeserving of *poiné*. On the other hand, religious scruples may often have led to purification.[1] This seems to have been religious practice rather than the actual bidding of the law.

Homicide was not considered by the Greeks nearly as serious a wrong as many crimes which today are viewed as far less heinous.[2] As has been said, it remained fundamentally a matter for the family to handle. This must always be considered in discussing prosecution. It is clearly stated in the homicide code of Draco that if a homicide case was brought before the king archon for reference to one of the five homicide courts, the only persons who were permitted to initiate proceedings were relatives up through the degree of first cousin.[3] In the actual prosecution, however, all relatives

[1] Cf. Antiph. vi. 4, where a man is said to purify himself if he kills his own slave.

[2] Cf. Calhoun, *Growth of Criminal Law*, p. 85.

[3] Cf. *supra*, I, 115.

and even members of the phratry participated (*συνδιόκεν δὲ καὶ ἀνεφσιὸς καὶ ἀνεφσιῶν παῖδας καὶ γαμβρὸς καὶ πενθερὸς καὶ φράτερας*).[1] This provision is substantiated by Demosthenes,[2] where the speaker is expressly told by the exegetes not to bring the case before the *basileus* on the ground that he is neither the relative nor the master of the dead woman. Again, in Plato's *Euthyphro*, Socrates assumes that the dead man in consequence of whose death Euthyphro proposes to bring action against his father before the *basileus* must of course have belonged to Euthyphro's household, for otherwise Euthyphro would not bring action.[3]

In each of these cases, from the fact that the action is before the *basileus*, the court concerned would be one of the five homicide courts. These courts were always characterized by a very archaic procedure, and it is not at all surprising to find that before them the practice continued of allowing only relatives of the victim to prosecute. Homicide procedure, being religious in origin, was highly conservative and change would not be expected. Furthermore, these courts had been founded, not for the purpose of insuring the prosecution of homicide, but rather for the purpose of differentiating the types of homicide and thereby procuring for the slayer, if guilty, a more equitable punishment. The lawgiver laid emphasis on the treatment and status of the criminal, not on making homicide a matter of concern to people in general. It is tempting, however, to suggest that in lack of relatives phratry members could initiate proceedings, even before the homicide courts. The laws clearly state that members of the phratry might join in the prosecution after it had been started and they also grant to selected phratry members, when there are no relatives, the right to extend *aidesis* to those who are convicted of unpremeditated homicide. Kahrstedt[4] states that phratry members could actually initiate a

[1] *IG*², I, 115, ll. 21 ff. [2] xlvii. 69–70. [3] *Euth.* 4B.

[4] *Op. cit.*, p. 245: "Schon o.S. 161 war der Satz zu erwähnen, dass bei Mordprozessen nächst den Angehörigen die *φράτορες* des Getöteten die Verfolgung einzuleiten berechtigt sind insofern als bei einem Fehlen naher Verwandter ein Ausschuss der *φράτορες* eintritt. Das ist kein Prozess, den die Phratrie als solche führt, da

homicide process in lack of close relatives, but he cites no proof for this assertion. It seems, however, a reasonable position to take in view of the above-mentioned extension to phratry members of privileges in homicide prosecution. Indeed, if there were no relatives of the victim, how could the criminal ever have been brought to trial and convicted in the first place—at least before one of the homicide courts—and thus made eligible to *aidesis?* The question must remain unsettled, especially in view of the fact that the notices about the homicide courts are comparatively few and have reference to the regular procedure and not to the exceptions to it.

In regard to prosecution the question arises as to whether it was obligatory for relatives of the slain man to prosecute. It is obvious that, if a slain man on dying had given a formal release to the murderer, nothing further was done. But if, on the other hand, the dying man made a formal charge to his relatives to secure vengeance for him, the relatives considered this a solemn obligation.[1] And for premeditated homicide there is no question but that the relatives always felt an obligation to prosecute unless release had been given. But the real problem lies in the question of involuntary homicide. Treston[2] insists that in such cases no trial or formal proceedings of any kind were necessary unless the dying man had made a formal charge to his relatives to prosecute. He bases his statement on Lysias xiii. 41 and 78, which passages merely prove that if such a charge were made the relatives felt a solemn obligation to act. They do not prove that in the absence of such a charge the relatives felt no such obligation. Treston assumes that whenever a trial for involuntary homicide took place either one of two things had happened: (1) the accused had denied the guilt and refused "private compensation" or (2) the dying man had charged his relatives to prosecute. There is unfortunately no evidence for this statement, but in the absence of such evidence it seems best to

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die betr. φράτορες von den Epheten, d.h. Areopagiten selbst ausgewählt werden; es ist nur ein Prozess einzelner privater φράτορες."

[1] Antiph. i. 29–31; Lysias xiii. 41, 92.

[2] *Op. cit.*, p. 146.

assume that some action was taken. Treston assumes that only in case of a formal charge was there any pollution for the slayer. He is undoubtedly correct in this statement. But once the formal charge had been made, the alleged guilty man was considered polluted until his innocence was proved, or, if found guilty, until he had undergone the proper penalty and had secured *aidesis*.

It is obvious from the foregoing that as long as the homicide courts were resorted to for redress for homicide only the relatives could initiate proceedings or perhaps phratry members in cases where there were no relatives. Accordingly, it would seem impossible that there could be a *γραφὴ φόνου*, that is, that anyone who wished to do so could bring a prosecution for homicide. Various scholars have pointed out that homicide cases never ceased to be *dikai*. Kahrstedt[1] has stated this very simply and clearly. Glotz[2] likewise holds this view, and Ranulf[3] says, "There was a *δίκη φόνου*, but not a *γραφὴ φόνου*." But in view of a passage of Pollux,[4] in which homicide is included in a list of public prosecutions, Treston[5] has argued in some detail the question as to whether or not homicide cases could be brought before a heliastic court by anyone who wished to do so. Such procedure would not be in accordance with the laws of Draco, and since it is recognized nowhere except in the passage of Pollux, Pollux' statement must be otherwise explained. Treston explains it as a confusion with *γραφὴ ἀσεβείας*, which could be brought by any citizen against a relative of a slain man who had failed to "proclaim" and to prosecute the slayer.

It is possible that the early attitude toward homicide as the affair of the relatives persisted in the fifth and fourth centuries to such an extent that no legislation was ever passed which permitted the homicide to be dealt with directly by

[1] *Op. cit.*, p. 161.

[2] *Op. cit.*, p. 425.

[3] *Jealousy of the Gods and Criminal Law at Athens*, p. 19.

[4] viii. 40: *γραφαὶ δὲ, φόνου καὶ τραύματος ἐκ προινοίας, καὶ πυρκαϊᾶς. καὶ φαρμάκων, κ.τ.λ.*

[5] *Op. cit.*, p. 260.

others than relatives of the victim.[1] Glotz[2] asserts that since homicide cases never ceased to be *dikai*, doubtless the state sometimes left crimes unpunished for lack of an accuser.[3] It is quite possible that occasionally there were no relatives or phratry members and sometimes, even if there were such persons, they may have had no interest in prosecuting. There was no statute of limitations for the prosecution of homicide,[4] and the fact that in both of the extant cases[5] in which a charge is laid upon the relatives to prosecute the case was not brought to trial for some years lends color to the view that only relatives could prosecute and that generally others outside the family were not concerned with bringing suit if the relatives failed to prosecute. Certainly here the fear of pollution played little or no part. However, it is difficult to suppose that the state would not devise some means by which, in the absence of a relative willing to prosecute, a notorious homicide could be prevented from staying in the city unpunished. Philippi[6] concludes that it is inconceivable that the state would not make provision for a crime which could not be tried by the common procedure. Furthermore, the procedure before the regular homicide courts was a long and tedious process and much of it was thoroughly antiquated. Even the relatives of a slain man may have desired something simpler.

As long as the homicide courts were used homicide continued to be the affair of the relatives. But what process might be used which could be brought by any interested person, so that the homicide might indirectly be brought to justice for his crime? In the *Lexica Segueriana*,[7] φονεῖς are included among those who could be dealt with by the sum-

[1] Cf. the Twelve Tables, which make no provision for manslaughter.

[2] *Op. cit.*, p. 425.

[3] Thucydides (viii. 65–66), in his account of political murders during the revolution of the Four Hundred, describes a different situation in which homicide went unpunished not because of lack of prosecutors but because of the terror of those who should have prosecuted.

[4] Lysias xiii. 83; cf. Lipsius, *op. cit.*, p. 853, n. 24.

[5] Antiph. i; Lysias xiii.

[6] *Op. cit.*, p. 106.

[7] P. 250, ll. 4 ff.

mary process of *apagogé*. In a passage of Demosthenes,[1] after an elaborate description of the five homicide courts the speaker continues by saying that there is a sixth method of dealing with homicide:

> If a man has been ignorant of all the other courses, or if the times within which they must each be pursued have gone by,[2] or if for any reason whatever he does not choose to adopt these methods of prosecution, but sees the homicide walking about in the temples and the market, it is lawful to carry him off to prison [ἀπάγειν ἔξεστιν εἰς τὸ δεσμωτήριον], but not to his own house, or where he pleases, as you have allowed. And when he is brought to prison, he will suffer nothing there before trial, but, if he is found guilty, he will be punished with death.

In actual fact, among the scanty number of homicide cases which have come down to us we find that two were certainly handled by *apagogé*.[3] In the Herodes case,[4] Euxitheus, a Mytilenean, was accused of the murder of Herodes and was summarily arrested and tried as a *kakourgos* before the Eleven. In the Agoratus case[5] the speaker accused Agoratus of the judicial murder of Dionysodorus. Agoratus had been summarily arrested and was being tried before the Eleven.[6]

It seems clear, then, that *apagogé* was a possible method of

[1] xxiii. 80.

[2] Apparently the reference here is to the fact that because of time required by the preliminary investigations the *basileus* could not accept a homicide case during the last three months of his term.

[3] It has been suggested that Menestratus was brought to trial by *apagogé* as a homicide for his activities under the Thirty (Lysias xiii. 56). According to the terms of the amnesty, however, only those who had slain αὐτοχειρίᾳ could be tried for homicide (Arist. *Ath. Pol.* xxxix. 5). It has therefore been argued that whatever procedure was used the charge was not φόνος (Gernet and Bizos, *Lysias*, I, 186 f.). Furthermore, it has been suggested that since he was a citizen the procedure for homicide could not be *apagogé* (*ibid.;* cf. also Gernet, *Revue des études grecques*, XXXVII [1924], 277, n. 3.) Thalheim, however, supposes that Menestratus was brought to trial by *apagogé* (Frohberger-Thalheim, *Ausgewählte Reden des Lysias*, p. 75).

[4] Antiph. v.

[5] Lysias xiii.

[6] Lycurgus (i. 112) says that when Phrynichus had been killed by Apollodorus and Thrasybulus they were caught and placed in prison (ἀποτεθέντων) by the friends of Phrynichus. If this story were true, the process here referred to would be *apagogé* (cf. Jebb, *Attic Orators*, I, 57, n. 1). According to the accounts of Thucydides (viii. 92), Lysias (xiii. 71), and Plutarch (*Alcib.* xxv. 10), the slayer of Phrynichus escaped.

dealing with homicide and that since *apagogé* was open to ὁ βουλόμενος it was possible for any interested citizen to prosecute for homicide under certain conditions. Now by what methods and under what conditions could a non-relative prosecute? In the above-quoted passage from Demosthenes the words ἀπάγειν ἔξεστιν εἰς τὸ δεσμωτήριον seem to provide for the use of *apagogé*. But the question is: Was such a method open to anyone in this case? It would seem that a proclamation had already been issued by the relatives against the homicide. Otherwise how could he be called ἀνδροφόνος? In this case, then, proceedings had actually been started. For some reason, however, the prosecution had failed to proceed in the regular way before the homicide courts.[1] But seeing him about in public places anyone who wished dealt with him by *apagogé*.[2] It may be suggested that the long-drawn-out process before a homicide court was frequently found irksome and that the other method would regularly be resorted to in case the homicide appeared in the places from which he was banned even during the three months of preliminary investigations. In this case action might be taken by the relatives. Or somebody else after the relatives had pronounced the interdict might choose to deal with the proclaimed homicide by this summary method. This form of *apagogé* may be called ἀπαγωγὴ ἀτίμων, i.e., against those who have been deprived of certain rights but are caught exercising them. This was probably the only possible form of procedure against parricides whose relatives would be expected to excommunicate them. Otherwise, if the relatives continued to allow the parricide to live with them they were subject to γραφὴ ἀσεβείας.

Treston[3] believes that such an indictment against the relatives of the slain man who had failed to proclaim and to pros-

[1] It may be suggested that a proclamation at the grave such as that recommended by the exegetes in Demos. xlvii. 69 was sufficient to brand a man ἀνδροφόνος. In this case, however, the exegetes specifically stated that the murderer should not be mentioned by name at the grave.

[2] Cf. Sorof, "Die ἀπαγωγή in Mordprocessen," *Jahrb. f. cl. Phil.*, XXIX (1883), 111.

[3] *Op. cit.*, p. 260.

ecute the slayer involved, if successful, a verdict of murder against the slayer. Demosthenes reports a case in which Diodorus' uncle was charged with impiety by Androtion for not prosecuting Diodorus on a charge of parricide. Diodorus makes the following statement: "If Androtion had succeeded in his prosecution of my uncle I, as a convicted parricide, should have been deprived not only of my property but of my life: nay, even to die, which is the common lot of all, would not for me have been easy."[1] Certainly no specific trial for parricide is referred to here. The alleged parricide would have been charged only indirectly in the course of the γραφὴ ἀσεβείας, but the trial of the uncle on that charge would necessarily have involved a review of and a decision on the guilt of the nephew.

On the other hand, it seems unlikely that another passage of Demosthenes[2] refers to the γραφὴ ἀσεβείας as a method of dealing with homicide, as Treston[3] interprets it. In this case the prosecutor was told by the exegetes not to bring a charge of homicide against Euergus and Theophemus before the *basileus*, but to wait and get vengeance in some other way. Treston argues that "the other way" is the γραφὴ ἀσεβείας, and that if such a charge had been brought against a relative of the nurse who had met with a violent death the charge would have involved a verdict of murder or of manslaughter against Euergus and Theophemus. In view of the fact that the nurse was a freedwoman and probably had no relatives of status which would enable them to bring suit in her behalf, this explanation is impossible. "The other way" referred to may well be *apagogé*.

Very frequently homicide is connected with some other crime such as robbery or housebreaking or kidnapping. The case would then come under the heading of κακούργημα and the homicide could be dealt with by *apagogé* by anyone who had knowledge of the offense. In this case naturally there is no interdict. The homicide is imprisoned until the trial takes place before the Eleven. In such a case doubtless the em-

[1] xxiv. 7. [2] xlvii. 70. [3] *Op. cit.*, pp. 260 f.

phasis was placed upon the *κακούργημα* and not upon the homicide. In case of conviction death was the penalty.[1]

There is still another kind of homicide which might be dealt with by *apagogé*. In case a non-citizen committed homicide and was tried at Athens, he was seized by *apagogé* and held prisoner until the time of his trial.[2] The reason for this is easy to see. Since the man was not a citizen, exile from Athens would be of little consequence to him. In such cases the non-citizen was allowed bail.[3]

Aside from the *γραφὴ ἀσεβείας* and *apagogé* there were doubtless other methods by which an interested person could bring a slayer to justice in behalf of a victim who was not his relative. Caillemer[4] thinks that the institution of a *γραφὴ φόνου* by Solon would have been inconsistent with the laws of Draco, but he admits that other methods of dealing with homicides were allowed and suggests that some homicides could undoubtedly be brought to justice by the process of *eisangelia*.[5] As a further method the *γραφὴ ὕβρεως* may be suggested. In case of maltreatment of a slave by his master any interested citizen might bring a *γραφὴ ὕβρεως*.[6] It has been

[1] Sorof (*op. cit.*, pp. 106 ff.) insists that the charge in Antiphon v was *Raubmord*. From the absence of the formula *ἐπ' αὐτοφώρῳ* in this case which appears in Lysias xiii. 85 as an indispensable condition for the apprehension of a homicide by *apagogé*, Sorof concludes that at the time of the case represented in Antiphon v a homicide could not be brought to trial by *apagogé*. In order to do that some other crime must be charged to him which came under the *νόμος κακούργων*. But probably at the time of the revision of the constitution after the restoration of democracy a provision was introduced that a homicide caught *ἐπ' αὐτοφώρῳ* could be tried by *apagogé*. This is a plausible suggestion, for it is inconceivable that a homicide caught *ἐπ' αὐτοφόρῳ* would be allowed to go. However, the charge against him might not be *φόνος*.

[2] Antiph. v and Lysias xiii.

[3] Meuss (*De ἀπαγωγῆς actione apud Athenienses*, pp. 27 ff.) admits *apagogé* only when the slayer was a foreigner.

[4] In Darem.-Saglio, *s.v. φόνος*.

[5] Cf. the review of Glotz, *La Solidarité*, by Dareste, in *Jour. des Savants*, 1905, p. 66, where he explains that at least in the time of Demosthenes any citizen could bring an *eisangelia*, or political action, before a heliastic court, and it was always easy to class a murder as a political crime. It is true that the process came to be widely employed for the most trivial offenses (cf. *supra*, I, 309).

[6] Aeschin. i. 17; Demos. xxi. 46; Hyper. *Frag.* 120; Lycurg. *Frag.* 74; Kahrstedt, *op. cit.*, p. 327.

argued convincingly by Morrow[1] that the same procedure could be used against the master who killed his slave.

From the foregoing discussion it is obvious that the old homicide courts did not furnish the sole means of bringing an alleged homicide to trial. However, how far the ancient feeling that homicide was the affair of the relatives of the homicide persisted and how many homicides remained untried must remain a problem. Unsuccessful *graphai* in which the prosecutor failed to obtain at least one-fifth part of the votes involved the payment of a fine by the prosecutor, and this fact must certainly have restrained possible prosecutors to some extent from engaging in suits which according to the traditional point of view were none of their business. If pollution played so small a part as would seem to be the case, the citizens would continue to be more or less unconcerned about homicide outside of their own families.

A question of prosecution arises in connection with kin slaying. If the murderer did not flee from the city, the only person who could prosecute him before one of the homicide courts was the kinsman of the slain man, who was also the kinsman of the homicide. But at least in this case the state could do something about failure to prosecute. In the Androtion case of Demosthenes a charge of impiety (γραφὴ ἀσεβείας) was brought against a man for association with his nephew who was a parricide and not because he failed to prosecute. But the resulting trial would involve necessarily a discussion of the homicide. Treston[2] believes that such a case brought in really a trial of the homicide and would end with a verdict for or against him. Glotz[3] says that there is never indication of kin prosecuting kin for homicide. The δήμου φάτις caused an excommunication equivalent to a sentence of exile. *Aidesis* was not possible for kin slaying. The homicide had to leave his country, at least for a time, and if he returned he had no further communication with his family.[4] Kin slaying resulted in complete disinheritance. For securing some kind of

[1] *CP*, XXXII, 210 ff.

[2] *Op. cit.*, pp. 260 f.

[3] *Op. cit.*, pp. 436 f.; cf. Ranulf, *op. cit.*, I, 19.

[4] Glotz, *op. cit.*, pp. 234 f.

action in kin slaying the state had the γραφὴ ἀσεβείας as a weapon.[1]

In ancient Athens, as far as can be determined, there was nothing corresponding to the modern coroner or coroner's jury. At the present time, when an individual dies a certificate from a physician stating the cause of death is required. If there is a suspicion that the deceased has met with foul play, there must be a coroner's inquest to determine the cause of death and if possible to discover the person or persons responsible. The Athenian procedure was widely at variance with the modern system. There were three exegetes or interpreters belonging to the family of the Eumolpidae whose duty it was to expound religious and ceremonial laws and to give advice in problems touching religious matters. It seems that it was a common practice to resort to these officials for advice if one was doubtful about the correct procedure in homicide cases. In Plato's dialogue *Euthyphro*, Euthyphro's father is represented as sending for advice to the exegetes after the murder of his slave at the hands of a hired man.[2] In this case the inquirer is the master of the murdered man. We do not know what advice the exegetes gave, for the hired man died from neglect before the messengers to the exegetes returned. Likewise, in the speech of Demosthenes against Euergus and Mnesibulus, the plaintiff, after the death by violence of an old woman who had formerly belonged to the family, but who had been freed by the plaintiff's family, repaired to the exegetes for advice.[3] The plaintiff is neither a relative nor the master of the dead woman. In this case the exegetes gave very definite advice. The speaker had told them all the details of the case, the connection of the woman, i.e., the former slave, now free, with the family, and how she lost her life in the house of the speaker in defense of his property. The exegetes advised that a spear should be carried in the funeral procession and a proclamation should be pronounced at the tomb and that thereafter the tomb should be guarded for three days: πρῶτον μὲν ἐπενεγκεῖν δόρυ ἐπὶ τῇ ἐκφορᾷ, καὶ προ-

[1] *Ibid.*, p. 442. [2] *Euth.* 4C. [3] xlvii. 68 ff.

αγορεύειν ἐπὶ τῷ μνήματι, εἴ τις προσήκων ἐστὶ τῆς ἀνθρώπου, ἔπειτα τὸ μνῆμα φυλάττειν ἐπὶ τρεῖς ἡμέρας.[1] The nature of the proclamation has been a matter of much dispute. It has been understood by some as a proclamation, given at the tomb by a relative of the deceased and containing an interdict against the murderer.[2] But others have understood it as an attempt made at the burial to find out if there is some relative who can prosecute.[3] It is hardly possible to interpret the Greek in this way, especially in view of the passage immediately following in which *προαγορεύειν* is used again: *ὀνομαστὶ μὲν μηδενὶ προαγορεύειν, τοῖς δεδρακόσι δὲ καὶ κτείνασι, εἶτα πρὸς τὸν βασιλέα μὴ λαγχάνειν.* Here it is clear that the proclamation is against the homicides, although the exegetes warn the speaker against calling the homicides by name. The proclamation is to be general, merely against *τοῖς δεδρακόσι δὲ καὶ κτείνασι.*

The following interpretation may be suggested. If it is possible to find a connection (*προσήκων*) of the woman, he is to make a proclamation at the tomb against the homicides by name, bidding them stay away from the forbidden places. This is merely a statement of the general law in such cases. But if no connection is found, the speaker of the present speech is to pronounce an interdict, but without naming the homicides. But he is to proceed no further with the case. In this case the deceased is a freed woman. She would therefore

[1] *Ibid.* 69.

[2] Kennedy's translation of the passage is noncommittal, but he adds a note: "This was a proclamation giving notice to the homicide to keep away from the tomb, and from all public places and sacrifices. It was followed, in case of a prosecution, by another notice, given in the market-place, warning the party accused to appear and answer the charge." Auger, quoted by Kennedy, translates: "Et qu'un des parents annonce au meurtrier, de ne pas approcher au tombeau." Dareste (*op. cit.*, I, 377) interprets in like manner: "D'abord s'il existe un parent de cette femme, il doit paraître aux obsèques une pique à la main, et debout sur la tombe prononcer l'interdiction du coupable, puis garder la tombe pendant trois jours."

[3] Cf. Pabst, quoted by Kennedy: "Und am Grabe ausrufen: ob irgend ein Anverwandter von der Frau vorhanden sei." Likewise Treston (*op. cit.*, p. 182) says: "To carry a spear in front of the funeral procession, and at the tomb to publicly inquire [*προαγορεύειν*] if the woman had any relative, and to watch the tomb for three days!"

have no relative of citizen status who could act for her. Her natural protector or *prostatés* would be the man who had freed her and who had formerly been her master. But in this case her protector is dead and the law therefore cannot be literally fulfilled. The present speaker is the son of the woman's dead *prostatés*, and it is because of this relationship to her that he goes to the exegetes to find out if there is anything that he can do about the matter. On the ground that the woman neither belonged to his family nor was his slave, the exegetes advise him not to prosecute. However, they do advise him to pronounce the interdict, not against anyone by name, but only *τοῖς δεδρακόσι καὶ κτείνασι*. He is allowed to do this only in case a *προσήκων* of the woman fails to appear. Philippi[1] sees in the *προσήκων* not a relative (who, being either slave or freedman, could not possibly prosecute) but the *prostatés*. Obviously in this case neither the relative nor the *prostatés* is a possible prosecutor. So the whole act is merely a ceremony to appease the dead woman. It could not possibly lead to an actual trial.[2] In the first mention of the interdict the exegetes are expounding the general law. In the second reference they are telling the speaker what he is actually to do in this particular case. This case is concerned with a freedwoman. In case of a murdered citizen who had no relatives it is not so easy to determine what is done. This is the only actual instance which has come down to us of an interdict pronounced at the tomb of a murdered person and unfortunately it concerns a non-citizen. It has been shown that whatever its content was, it was a pure formality and led to nothing.

Schoemann[3] supposes that there were three proclamations, the first one by the relatives at the tomb, the second by the relatives in the agora at the time of the presentation of the case, and the third by the king archon on his acceptance of the case. Philippi[4] objects to this on the ground that there is

[1] *Op. cit.*, p. 99.

[2] Cf. *ibid.*, pp. 98 f.

[3] *Antiquit.*, pp. 289 f.; but cf. Schoemann-Lipsius, *op. cit.*, I[4], 508 f.

[4] *Op. cit.*, pp. 69 f., 99.

only one case of the proclamation at the grave and that it is pure ceremony. No real accusation could come from it, and in quite exceptional circumstances it might be made by others than the relatives. This proclamation was merely to appease the dead. He believes that there was only one real proclamation, the one after the *basileus* had accepted the case.[1] This is a reasonable point of view. The proclamation at the tomb has the characteristics of a very ancient ritual. It may be suggested that the spear which is carried out in the procession to the grave is an emblem of hostility and that its purpose is to show the hostility of the relatives of the deceased toward the murderer and their intention perhaps to prosecute him whoever he may be. This is the view of the lexicographers.[2] Perhaps the proclamation forbade the murderer to approach the tomb.[3] This proclamation apparently has nothing to do either with pollution or with state intervention in homicide, but is rather a survival of a very ancient ritual, an assurance to the deceased that his relatives will obtain the *poiné* which is due to him and a warning to the murderer of their intention.

There is considerable evidence available, on the other hand, for the interdict in the agora before the beginning of a homicide trial. According to a passage in the homicide laws of Draco, the interdict had to be made by relatives within the degree of first cousins: *προειπεῖν τῷ κτείναντι ἐν ἀγορᾷ ἐντὸς ἀνεψιότητος καὶ ἀνεψιοῦ*.[4] Again in Antiphon's speech on the Choreutes the relatives of the dead chorus boy are the ones who decide to prosecute the choregus and to have the interdict pronounced against him.[5] Now in the *Constitution of Athens* Aristotle in a discussion of the duties of the *basileus* makes the following statement: *καὶ ὁ προαγορεύων εἴργεσθαι τῶν νομίμων οὗτός ἐστιν*.[6] This statement led Lipsius[7] to think

[1] Cf. Gilbert (*Const. Antiqu.*, p. 385, n. 1), who agrees with Philippi.

[2] Cf. Harpocration, *s.v.* *ἐπενεγκεῖν δόρυ ἐπὶ τῇ ἐκφορᾷ*; Pollux viii. 65; *Lex. Seg.*, p. 247, l. 30.

[3] Cf. Kennedy, *ad loc.*

[4] *IG*², I, 115; this is repeated in Demos. xliii. 57.

[5] vi. 34–36.

[6] lvii. 2.

[7] *Op. cit.*, p. 810.

that the proclamation was actually pronounced by the *basileus*, and indeed this may have been the case. This does not alter the fact, however, that it was the relatives who instigated the action while the *basileus* acted as their mouthpiece for the proclamation.[1]

The general purport of the proclamation against the homicide is given in several passages. Demosthenes says[2] that the homicide was to be excluded from "lustrations, cups, drink-offerings, from temples and the market place." The purpose of this interdict is twofold: to forbid the presence of the murderer in certain public places and thus to avoid spreading pollution and also, as a part of the *poiné* due to the victim, to prevent the participation of the murderer in anything in which the deceased would have taken part during his lifetime. So both stages in the history of homicide procedure are represented in this proclamation: the early period, when there was no pollution connected with homicide but recompense had to be secured, and the later period when still only the relatives could prosecute, but when it was necessary to guard the state against the pollution which a murderer could spread abroad.

There are some debated points in regard to evidence before the homicide courts, particularly regarding the admission of women and children and slaves as competent witnesses. On the basis of a passage in Demosthenes it has been convincingly argued that in cases of homicide women, and children as well, regularly appeared in the capacity of witnesses.[3] In this case the only witnesses to the assault on the freedwoman were the wife and children of the defendant. The plaintiff admits that he and his wife and children might take a solemn oath in the Palladium but they would thereby be in danger of incur-

[1] Pollux (viii. 90) doubtless drew his account from Aristotle. For the view of Philippi, who thinks that the relatives made the proclamation on the order of the *basileus*, cf. *supra*, I, 114, n. 1.

[2] xx. 158.

[3] xlvii. 69 ff.; cf. Bonner, "Did Women Testify in Homicide Cases at Athens?" *CP*, I, 127 ff.; "Evidence in the Areopagus," *ibid.*, VII, 453; Leisi, *Der Zeuge*, pp. 17 ff.; Lipsius, *op. cit.*, p. 874, n. 20.

ring the odium of perjury. Hence, being averse to taking a false oath, he let the matter drop. Undoubtedly the oath here contemplated was an oath to substantiate a claim to relationship with the deceased. It is beyond doubt, then, that women and children had the right to appear publicly and to take solemn oaths. But the further question arises of the capacity in which they would have appeared if they had taken the oath: as joint prosecutors, as regular witnesses, or as special witnesses to the fact of relationship. The expounders virtually call them witnesses when they say: *ἐπειδὴ αὐτὸς μὲν οὐ παρεγένου, ἡ δὲ γυνὴ καὶ τὰ παιδία, ἄλλοι δέ σοι μάρτυρες οὐκ εἰσίν*. Eyewitnesses must have been necessary for securing a conviction, and it is assumed that a conviction was possible. If they were joint prosecutors, they could not appear as witnesses. But in any event in the contemplated oath they would have sworn to the same thing which the prosecutor swore to in his *diomosia* and would thus be virtually witnesses.[1] Plato's rules regarding competency of witnesses afford by implication a striking confirmation of the view that women were competent witnesses in homicide cases. Women over forty years of age are to have a general right to give evidence in any case, and slaves and children are to be allowed under special restrictions to testify in homicide cases.[2] Plato has here started with the Athenian practice which admitted women to testify in cases of homicide, and extends this right to "infants" and to slaves.[3] Next he proceeds to increase the privileges of women by allowing them to testify in any case, provided they are over forty years of age. It is true that there are no instances where women actually testified in homicide cases, but, as has been pointed out,[4] in none of the few homicide cases with which the extant speeches deal could a woman have been involved as a witness. A woman appears as defendant in Antiphon i, and in Lysias i a woman

[1] Bonner (*CP*, I, 129 f.) refutes Mederle's contention (*De juris jurandi in lite Attica decem oratorum aetate usu*, p. 29) that the oath of the wife was a regular evidentiary oath. As an oath on the question of relationship it can hardly be an evidentiary oath.

[2] *Laws* 937A–B. [3] Cf. Bonner, *op. cit.*, p. 131. [4] *Ibid.*, p. 132.

appears, but as wife of the defendant and paramour of the slain man she naturally is not brought in as a witness.

In Antiphon[1] the choregus, previously to a regular accusation, had been informally charged with homicide in a court where he was to be a prosecutor on the following day. On two successive days in the presence of dicasts and spectators he challenged his accuser to take witnesses and go to those who were present when the alleged poison drink was administered. He said that more than fifty men and boys were present and offered to furnish a list of their names. This proceeding was to take place before the formal charge was made and was intended to show the relatives of the boy that there was no ground for bringing the charge. Consequently the boys were not witnesses in the legal sense at this stage of the inquiry but some of them were doubtless among the witnesses called a short time earlier in the speech.

On the basis of a single sentence in Antiphon it is quite generally assumed that a slave could give evidence for the prosecution in the case of homicide. The passage is as follows:

εἴπερ γὰρ καὶ μαρτυρεῖν ἔξεστι δούλῳ κατὰ τοῦ ἐλευθέρου τὸν φόνον, καὶ τῷ δεσπότῃ, ἂν δοκῇ, ἐπεξελθεῖν ὑπὲρ τοῦ δούλου, καὶ ἡ ψῆφος ἴσον δύναται τῷ δοῦλον ἀποκτείναντι καὶ τῷ ἐλεύθερον, εἰκός τοι καὶ ψῆφον γενέσθαι περὶ αὐτοῦ ἦν, καὶ μὴ ἄκριτον ἀποθανεῖν αὐτὸν ὑφ' ὑμῶν.[2]

[1] vi. 19, 22 ff.

[2] Antiph. v. 48. Leisi (*op. cit.*, p. 21) also quotes a sentence from Antiphon as follows: *οὐ γὰρ ἐπὶ ταῖς τοιαύταις μαρτυρίαις βασανίζονται (οἱ δοῦλοι), ἀλλ' ἐλεύθεροι ἀφίενται*, ii. *γ*. 4. This passage really has no bearing on the question. In the first speech of the prosecutor we are told that the slave of the murdered man was mortally wounded, but still able to speak and tell the bystanders who the murderer was (ii. *α*. 9). These witnesses were to be produced to tell what the dying slave said. This would be hearsay testimony under one of the categories permitted in Athenian courts, as Leisi himself elsewhere points out (*op. cit.*, p. 96; cf. *supra*, p. 130 ff.). In his reply the defendant tries to show his skill by confusing the issue with attacks on the credibility of the slave's statement, which he calls *μαρτυρία* in the sense of information. He ends his attacks by saying: *ἀπιστουμένων δὲ καὶ τῶν ἄλλων δούλων ἐν ταῖς μαρτυρίαις (οὐ γὰρ ἂν ἐβασανίζομεν αὐτούς) πῶς δίκαιον τούτῳ μαρτυροῦντι πιστεύσαντας διαφθεῖραί με*; ii. *β*. 7. These words show clearly that the statements (*μαρτυρίαι*) of slaves are not accepted without torture. When the prosecutor returns to the information gained from the slave, he confuses the matter still further by saying that in such information as that given by the slave it was not the practice to torture the slave but to set him free. This points clearly to an information

But this view has not gone unchallenged. From a modern standpoint homicide is the most serious crime in the calendar. And so we are not at first surprised that an exception should be made in the matter of a slave's competency in an effort to use every available means to convict a slayer. But the Athenians took no such serious view of homicide. If the relatives failed to prosecute, a slayer might not be brought to trial at all for the homicide.[1] Furthermore, the general attitude of freemen to slaves in the ancient world should be fully realized by those who would put them on a par with freemen as witnesses in homicide cases. Slaves were sold, beaten, and half-starved at times. In all actual cases in the orators we hear of nothing but evidence extracted by torture. In the southern section of the United States less than three-quarters of a century ago slaves were held by civilized and cultured people. And yet under no circumstances whatsoever could a slave be a competent witness against a white man.[2] We must be wary of any theory that Athenian citizens would have permitted their lives and liberties to be endangered by a slave testifying in any kind of a case.

The statement in Antiphon is a mere *obiter dictum*, as lawyers say. A slave was indeed said to be cognizant of some facts which pointed to the guilt of the defendant, but the prosecution never thought of producing him as a witness. In fact, they got possession of him and put him to death instead of using him as an informer or allowing the defendant to put him to the question. Against this conduct on the part of the prosecution the defendant protested in rather ponderous and

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(μήνυσις), but since the informer was dead it could only be an ante-mortem statement reported by those who heard and as such was permitted (cf. Thiel, *Antiphons Erste Tetralogie*, pp. 81 ff.). The reference to the slave's information as μαρτυρία is but another instance of lack of precision in the use of technical words. The only witnesses in the case were those who reported the statements of the slave.

[1] Cf. *supra*, pp. 210 ff.

[2] "Any negro or mulatto, bond or free, shall be a good witness in pleas of the commonwealth for or against negroes or mulattoes, bond or free, or in civil pleas where free negroes or mulattoes shall alone be parties, and in no other cases whatsoever" (*Acts of Virginia General Assembly*, *Code*, Vol. I [1814], c. 283, 4).

pompous fashion by pointing out that a slave had some protection under the law and some rights and so should not be put to death with impunity. Among the rights of the slave was the right μαρτυρεῖν for the prosecution in a homicide case. As was long ago suggested by Platner, μαρτυρεῖν is used loosely for μηνύειν. For the purposes of the speaker the argument is not weakened if μαρτυρεῖν equals μηνύειν.[1] Anyone familiar with Athenian legal terminology will scarcely deny that an argument based upon the notion that a word is always used in its technical sense rests upon an insecure foundation. Law was administered by amateurs; the speeches upon which we have to rely are not so much legal disquisitions clothed in the exact terminology of modern counsel as rhetorical addresses to a panel of dicasts whose knowledge of law and procedure must not be overestimated. It was inevitable that the technical and the literary signification of words should be occasionally confused. This is particularly true of μάρτυς and μαρτυρεῖν, as Guggenheim has shown.[2]

In this connection it should be observed that slave evidence is to be allowed only in case it is against the defendant in a homicide case. This is suspiciously like an information (μήνυσις) which could only be against someone. It would be quite as important, for example, to use the testimony of a slave to establish an alibi and free his master or another from a charge of homicide. But it is evident that the problem cannot be settled by attempts to prove that μαρτυρεῖν is the equivalent of μηνύειν. Leisi[3] is correct in urging that "Alles, was Gug-

[1] *Der Process und die Klagen* (1824–25), I, 215; Guggenheim, *Die Bedeutung der Folterung im Attischen Process* (1882), pp. 3 ff. These arguments were rejected by Meier-Schömann-Lipsius, *Der Attische Process*, pp. 875 ff. Bonner (*Evidence in Athenian Courts* [1905], p. 34) revived the case against slave witnesses. Wyse (*CR*, XX [1906], 59) approves, as does Thiel (*op. cit.*, p. 81). Leisi (*op. cit.*, pp. 12 ff., 21, n. 1), while adhering to the view of Lipsius, makes some important concessions. Bonner (*CP*, VII, 453 ff.) answers the objections of Leisi. Lipsius (*op. cit.*, pp. 873 f.) maintains his former position but makes an important concession which will be discussed later. Thus the matter stands.

[2] *Die Bedeutung*, pp. 7 ff. E.g., if one insists upon the technical meaning of these words wherever they occur, he could prove that a party to a suit could be regarded as a witness for his opponent.

[3] *Op. cit.*, p. 22.

genheim, S. 11 f., und Bonner, *Evidence*, S. 34–38, dagegen anführen, macht die Annahme, dass Antiphon daselbst *μαρτυρεῖν* auch wieder für *μηνύειν* brauche, *möglich*, aber nicht absolut *notwendig*." Leisi quotes as decisive a provision in Plato's *Laws*[1] as follows: *δούλῃ δὲ καὶ δούλῳ καὶ παιδὶ φόνου μόνον ἐξέστω μαρτυρεῖν καὶ συνηγορεῖν*. But this provision of Plato differs from the rule deduced from Antiphon in one very important respect. Plato would permit a slave to give evidence either *for* or *against* a defendant charged with homicide. It is extremely hazardous to assume that Plato is following Attic law here or elsewhere. Lipsius dismisses the possibility.[2] Plato's proposal to let slaves *συνηγορεῖν* is quite incompatible with Athenian practice.[3] In the minor homicide courts whose procedure is set forth in the laws of Draco, the right to join in the prosecution (*συνδιώκειν*) is extended from blood relatives only to relatives by marriage and phratry members.

But the decisive objection to the theory that slaves could give evidence against a defendant charged with homicide is the fact that there is no trace of such evidence in the orators.[4] In most of these cases slaves appear. In the first oration of Lysias an adulterer was slain by the woman's husband who discovered the liaison and trapped the adulterer through information furnished by his wife's maid.[5] The relatives of the slain man claimed that he was not an adulterer at all but was enticed into the house and slain without justification. Now if the claim of the prosecution was true, the girl could have been put on the witness stand to refute the story which her master said she told him and be a witness against him. It is easy to

[1] 937A.

[2] *Op. cit.*, p. 874, n. 32: "Unverwertbar für attisches Recht ist die Vorschrift von Platon *Ges.* 937A wegen des letzteren Zusatzes und des weiter Folgenden."

[3] Cf. Wyse, *CR*, XX, 59.

[4] All Antiphon's six speeches, including the three sets of practice speeches, and Lysias i, xii, and xiii are wholly concerned with homicide. There are at least three other references to proceedings in homicide cases: Demos. xlvii. 68 ff.; lix. 9 f.; and Isoc. xviii. 52 ff.

[5] i. 18 ff.

dismiss this possibility by saying that a slave girl would not voluntarily contradict her master. Quite true, but the explanation only serves to show how wholly impracticable it would be to obtain from a slave trustworthy evidence against the master.

In the Herodes murder case we have at least one slave who could have appeared against the defendant. The charge of the prosecution, if we may trust the statements of the defendant, was based upon information furnished by a slave under torture. This slave was a member of the crew of the ship which took Herodes and Euxitheus to Methymna and then returned to Mytilene where Herodes and his relatives lived. The slave was purchased by the prosecution[1] and made a statement incriminating Euxitheus. The slave, however, according to the story of the defendant, finding that he was to be put to death anyway, changed his story and so exonerated the defendant.[2] The slave upon whose story the prosecution relied is called *τὸν μηνυτήν, ᾧ πιστεύοντες ἐμὲ διώκουσι.*[3] It must occur to any reader that, if the slave were a competent witness, the prosecution would have produced him for they had him in their power. But it does not require much ingenuity to discover more than one reason for their not doing this, especially if the defendant's story of the torture is true. But if the slave were really a competent witness who could appear in court and tell his story,[4] it is simply inconceivable that the defendant did not protest that instead of torturing him the prosecution should have produced him as a witness. Instead of availing himself of this safe and reasonable means of throwing discredit upon the case of the prosecution, he argues that the slave should have been turned over to him-

[1] Antiph. v. 47. [2] *Ibid.* 32 ff.

[3] *Ibid.* 34; cf. 36, 47. When Herodes disappeared, and did not return to the vessel in which he and Euxitheus, the defendant, were sailing, Euxitheus offered to send his own servant to Mytilene with the news and to set further inquiries on foot. His words, *καίτοι οὐ δήπου γε κατ' ἐμαυτοῦ μηνυτὴν ἔπεμπον εἰδώς* (24), show that if the servant had anything incriminating to report it would be as an informer and not as a witness.

[4] At this time evidence was still oral, and evidence in homicide courts was always oral (cf. Bonner, *CP*, VII, 450 ff.; Lipsius, *op. cit.*, p. 884).

self for questioning under torture.[1] His friends also had proposed the same course by way of challenge when they heard about the prosecution's dealing with the slave.[2] Is it possible that a defendant whose words have been interpreted to mean that slaves were competent witnesses in homicide cases should have failed to invoke the law in his own behalf? A shrewd and able counsel like Antiphon would surely not have failed his client so completely.

Leisi is properly impressed by the absence of any reference to slaves as actual witnesses in homicide cases and suggests that the law merely permitted slaves to testify; it did not forbid their being tortured according to the practice in other cases. Here is his final conclusion:

> Im allgemeinen gilt aber eine auf der Folter abgenommene Aussage für zuverlässiger als ein Zeugnis. Diese Regel wird sich auch auf das Zeugnis von Sklaven erstrecken, und daraus wird es sich erklären, warum wir weiter nichts von Sklavenzeugnis hören. Das ganze Institut macht den Eindruck von einem Residuum einer frühern Gerichtsordnung, das aus religiöser Scheu vor Änderung der alten geheiligten Satzungen an den Blutgerichtshöfen bestehen blieb.[3]

In a word the law was obsolete even in the time of Antiphon. It had disappeared without leaving a trace in legal practice.

There is, however, another case in point with which neither Leisi nor Lipsius was familiar. In *Theomnestus* v. *Neaera*[4] there is a brief account of a homicide trial. Some time before the present trial Stephanus, the husband of Neaera, prosecuted Apollodorus, the brother-in-law of the plaintiff, in the Palladium for homicide. In support of this charge, which was proved in court to be false, Stephanus produced some slaves as witnesses, representing them as Cyrenaeans (*παρασκευασάμενος ἀνθρώπους δούλους καὶ κατασκευάσας ὡς Κυρηναῖοι εἴησαν*). Here at least is a case where there were no obstacles to producing these slaves in court if they were indeed competent witnesses. Their testimony was against the defendant and they were obviously in the control of the prosecutor. If they were competent, why did Stephanus in pressing a doubtful case incur an additional risk by pretending that they were

[1] Antiph. v. 36. [2] *Ibid.* 34. [3] *Op. cit.*, p. 23. [4] Demos. lix. 9 f.

freemen? Quite apart from the other considerations, this case alone is sufficient to show that slaves were not competent witnesses in homicide cases. Lipsius, in the text of *Das Attische Recht*, says: "Ausgeschlossen von dem Zeugnisrechte sind also zunächst die Sklaven mit der leicht verständlichen Ausnahme von Blutprozessen, wenn ihr Zeugnis den eines Mordes Angeklagten belastet."[1] In the note, however, he suggests in reference to the Stephanus case, to which his attention was called by Bonner, that the exception applied only to murder trials in the Areopagus: "So liegt die Annahme sehr nahe, dass die Ausnahme nur für Mordklagen vor dem Areopag gegolten hat." He gives not the slightest hint why an exception should be made in cases before the Areopagus. The *obiter dictum* upon which alone the whole theory rests does not even occur in a speech before the Areopagus. It would have been much better to abandon the theory altogether than to try so unconvincingly to salvage a shred. It is beyond belief that the Athenians should accept the testimony of a slave like that of any other witness against a man charged with homicide but bar, unless given under torture, his statement as to who began a brawl.

Before dealing with the problems of punishment for homicide, it will be convenient to summarize the punishments for the different types. Any slayer, including the kin slayer, might be granted release by his victim, and in such cases no trial ensued. But if a slayer was not released and remained to stand his trial, after the first speeches of the parties he was allowed to go into exile if he chose. In case he stayed and the trial was completed, equal votes secured his acquittal.[2] If acquitted, he made a thank-offering to the Σεμναί.[3] If convicted of premeditated homicide he was put to death. If convicted of unpremeditated homicide he was sent into exile until he obtained *aidesis*.

For premeditated homicide no *aidesis* was possible. A murderer who had not been granted release by his victim and who had gone into exile before the court pronounced judg

[1] P. 873. [2] Antiph. v. 51. [3] Paus. i. 28. 6.

ment would never receive *aidesis* from his victim's relatives.[1] But in cases of *φόνος ἀκούσιος* there is a question as to whether there was a legal term of exile after the expiration of which the relatives were compelled to grant *aidesis* or whether the relatives of the slain man had full power to decide whether the homicide's application for *aidesis* should ever be granted. It is the opinion of most scholars that there was a legal term of banishment, although there is not agreement as to its length. Gilbert[2] states that there was such a legal term, but admits that its duration cannot be estimated. Philippi[3] distinguishes two possible situations, that is, when an agreement is made with relatives of the slain and when no such agreement is made. In this second case most scholars fix the term at one year, basing their conclusion on the word *ἀπενιαυτισμός*, which is found in the scholia and lexicographers, which they take to mean a period of one year. But this word does not necessarily mean only one year.[4] Philippi thinks that the legal term must have exceeded a year in consideration of a passage from Antiphon: *ἐπί τε γὰρ τῇ τούτου διαφθορᾷ ἀβίωτον τὸ λειπόμενον τοῦ βίου διάξω, ἐπί τε τῇ ἐμαυτοῦ ἀπαιδίᾳ ζῶν ἔτι κατορυχθήσομαι.*[5] Philippi does not, however, venture an opinion on the exact duration of the exile. Treston[6] speaks also of a legal term of exile and, relying on Plato, thinks that the term of exile was normally one year. Glotz,[7] on the other hand, does not believe that the Athenians fixed the length of *ἀπενιαυτισμός*. It is difficult to rely on Plato, for he has four classes of homicide instead of the two of Athenian law, *ἑκούσιος* and *ἀκούσιος*, and he has four penalties, one-year, two-year, three-year exile, and death. In the absence of further evidence, however, it does not seem likely that the Athenian state, after intervening in homicide, would have

[1] Cf. Philippi, *op. cit.*, pp. 143 ff.; Demos. xxi. 43; xxxvii. 58 ff.

[2] *Op. cit.*, p. 382. [3] *Op. cit.*, pp. 114 ff.

[4] Cf. Plato *Laws* 868E: *τριετεῖς ἀπενιαυτήσεις διατελεῖν.* [5] iii. *β*. 10.

[6] *Op. cit.*, pp. 211 ff. Cf. the one year exile of Theseus for the slaying of the Pallantidae (Euripides *Hipp.* 37).

[7] *Op. cit.*, p. 309.

permitted an angry family to refuse the involuntary slayer reinstatement in his country for a long period of time or even to doom him to lifelong exile. But yet Draco's law seems to make it clear that the pardoning power rested entirely with the relatives. If they agreed to grant pardon it was granted. If one relative refused the pardon was stopped. One might argue, however, that there was a legal term after the expiration of which the family could no longer refuse to pardon.

As long as the wilful murderer who had escaped into exile or the man exiled by the court for involuntary homicide and not yet pardoned remained in exile and avoided the places stipulated by law, he was protected from being molested. It was a punishable offense to kill him.[1] His slayer was subject to the same laws as any other slayer. But if a homicide was caught in any of the forbidden places, he could be killed with impunity or taken for execution to the thesmothetai or informed against.[2]

[1] Demos. xxiii. 38, 29 ff., 51 ff.; *IG*², I, 115.

[2] For a discussion of the punishments for homicide cf. Gilbert, *op. cit.*, p. 387.

CHAPTER IX

APPEALS, PARDONS, AND NEW TRIALS

Aristotle regards the ἔφεσις εἰς δικαστήριον as one of the most significant democratic features of the constitution of Solon.[1] The word ἔφεσις means in Attic procedure a "reference" of a case from any judicial officer, body, or board to a dicastery.[2] If the *ephesis* depends upon the volition and action of the losing party in the original proceedings, it is to all intents and purposes an "appeal" as it is known in Anglo-American law and practice. But if the *ephesis* is required by law, it is in no sense an appeal. These two meanings are not always distinguished in the sources.[3] Aristotle in attributing so much importance to *ephesis* has in mind not only the Solonian *ephesis* but all the cases of *ephesis*, whether appeals or references required by law, that he mentions in his book. In consequence, there has been considerable difference of opinion regarding the meaning of *ephesis* in its various occurrences in literary and epigraphical sources.

Solon's *ephesis* is the earliest example of a real appeal,[4] but long before his day magisterial decisions could be reversed or quashed. In the pre-Draconian system the Areopagus, the sovereign body in the state, had the task of supervising the laws[5] and seeing that the magistrates in both their executive and their judicial capacities paid heed to the laws. The authority clearly implied the right to nullify the verdict of a

[1] *Ath. Pol.* ix. 1; cf. Plut. *Solon* xviii. 2; *supra*, I, pp. 159 ff.

[2] In the following discussion of *ephesis* a number of suggestions are drawn from the unpublished doctoral dissertation of John D. Ralph, *Ephesis in Athenian Courts* (University of Chicago, 1936).

[3] Cf. Pollux viii. 62.

[4] Cf. Lipsius, *Das Attische Recht*, p. 28; Thalheim, in Pauly-Wissowa, *s.v.* Ἔφεσις; Busolt-Swoboda, *Griech. Staatsk.*, p. 851.

[5] Arist. *Ath. Pol.* iii. 5: ἡ δὲ τῶν Ἀρεοπαγιτῶν βουλὴ τὴν μὲν τάξιν εἶχε τοῦ διατηρεῖν τοὺς νόμους.

magistrate contrary to a specific law. Such action would naturally be taken by the Areopagus at the instance of an Areopagite, who became aware of the character of the verdict in question. His source of information might very well be the aggrieved party. But such informal complaints to Areopagites were not appeals because there was no constitutional machinery for presenting the case to the Areopagus. Nevertheless, there is the germ of an appeal. It must be admitted that these virtual appeals to the supreme authority in the state were infrequent and of little value to the oppressed masses. So long as laws were unwritten and uncertain the ordinary citizen had little chance of having a "crooked decision"[1] of an aristocratic magistrate reversed. The code of Draco takes an important step toward mitigating abuse of magisterial judicial authority:

ἡ δὲ βουλὴ ἡ ἐξ Ἀρείου πάγου φύλαξ ἦν τῶν νόμων, καὶ διετήρει τὰς ἀρχὰς ὅπως κατὰ τοὺς νόμους ἄρχωσιν. ἐξῆν δὲ τῷ ἀδικουμένῳ πρὸς τὴν τῶν Ἀρεοπαγιτῶν βουλὴν εἰσαγγέλλειν, ἀποφαίνοντι παρ' ὃν ἀδικεῖται νόμον.[2]

Solon seized upon this principle and applied it in his own constitution by permitting an appeal to the Heliaea, just as he developed freedom of prosecution, another of his three great democratic features, from a germ found in Draco's laws.[3]

Of the proceedings involved in a Solonian appeal we know practically nothing. In case the magisterial verdict was upheld, the Heliaea had the right to increase the penalty.[4] It is to be assumed that if within a time limit no steps were taken by a dissatisfied litigant, the magistrates' verdict became final.

The commonly accepted view that the Solonian *ἔφεσις εἰς τὸ δικαστήριον* was a real appeal has not gone unchal-

[1] Hesiod *Works and Days* 219–21, 250; cf. *Il.* xvi. 386 ff.

[2] Arist. *Ath. Pol.* iv. 4. Regarding the authenticity of this section there can be little doubt; cf. *supra*, I, 145.

[3] Cf. *supra*, I, 157 ff., 166.

[4] Lysias x. 16; cf. Busolt-Swoboda, *op. cit.*, pp. 851, 1151; Busolt, *Griech. Gesch.* (1895), II, 285, n. 1.

lenged. Wilamowitz[1] asserts that ἔφεσις means that the magistrate had to refer to the Heliaea all penalties beyond a limit fixed by the various laws dealing with particular offenses. There is no support for this view in the only law we have regarding judicial action by the Heliaea: δεδέσθαι δ' ἐν τῇ ποδοκάκκῃ ἡμέρας πέντε τὸν πόδα, ἐὰν προστιμήσῃ ἡ ἡλιαία.[2] This law of Solon answers fully the view that the verdict of the magistrate is not a verdict of first instance.[3] The Heliaea, if it upheld the verdict of a magistrate, had the power to impose an additional penalty, just as an English court of appeal may increase the penalty of the lower court if it rejects the appeal.[4] In this law of Solon the Heliaea adopts and supplements the verdict of the magistrate. Adcock, after pointing out the relative unimportance of cases such as that referred to in Lysias x. 16, continues: "We may then suppose that the magistrates judged cases regularly with the help of a meeting of citizens."[5] If this means that a magistrate presided in the Heliaea when his own cases came up for appeal it is wholly reasonable.[6] But if it means that in the

[1] *Arist. und Athen*, I, 60.

[2] Law of Solon, Lysias x. 16. Lipsius (*Berichte der Königlich Sächsischen Gesellschaft der Wissenschaften* [Philol.-Hist. Classe], L [1898], 157) rightly rejects Wilamowitz' supposition without discussion. In *Das Attische Recht*, p.30, n. 94, he suggests that the court had the power to supplement the penalty fixed by law rather than the penalty imposed by the magistrate. No doubt the magistrate did inflict the penalties prescribed by law, so the suggestion of Lipsius does not alter the situation.

[3] Steinwenter, *Die Streitbeendigung durch Urteil, Schiedsspruch und Vergleich nach griechischem Rechte*, p. 71: "Das ἐφιέναι ist dann eben nichts anderes als die Erklärung der Partei, dass sie den Beamtenspruch nicht als bindend anerkenne, sondern die Entscheidung des ordentlichen, des Geschworenengerichtes verlange. Gewiss liegen dann zwei 'Erkenntnisse' vor, das des Beamten und jenes der Heliaia, aber man kann nicht gut von einer zweiten Instanz sprechen und auch nicht von einer Appellation, da die Heliasten keine eigentliche Kassation oder Reformation vornehmen." The further statement that the mere existence of the right of appeal (*die Tatsache der Ephesis*) renders the magistrate's verdict ineffective (*wirkungslos*) might be amplified as follows: the magistrate's verdict is not a verdict because an appeal lies, and so there can be no appeal because there is no real verdict. The conclusion is obvious.

[4] For further examples of penalties imposed upon an unsuccessful appellant cf. *supra*, I, 179.

[5] *CAH*, IV, 56.

[6] Cf. Busolt-Swoboda, *op. cit.*, p. 1151.

first trial of all cases the Heliaea participated, it is less defensible than the supposition of Wilamowitz.

The Solonian appeal disappeared from Athenian practice when the Heliaea was organized into dicasteries and the magistrate lost practically all judicial power. But with the institution of public arbitrators appeals were restored.[1] A real remnant of the pre-Solonian power of the magistrates to decide cases finally on their own authority[2] is found in the competence of the Forty to pronounce final judgment on cases involving not more than ten drachmas. All other cases filed with them were turned over to the public arbitrators.[3]

The first duty of the arbitrator was to try to secure some settlement or compromise that would be satisfactory to both parties. Of the method of procedure in this first stage we have no information in the sources. Doubtless, like private arbitrators, they sought "what was in the interest of all," to use a phrase of Isaeus.[4] In any event, the agreement effected was as binding as any contract and could be pleaded in bar of any future action in the same matter. Failing in this endeavor, the arbitrator ceases to be a διαλλακτής and becomes a real δικαστής capable of rendering a verdict in accordance with the law and the facts. The proceedings, as may be inferred from Aristotle's account, are now practically the same as those of a regular court and include depositions, challenges, and laws; but they are spread over several meetings and are less formal. On a set day the arbitrator delivered his award (γνῶσις). On the selfsame day the defeated litigant must decide whether he would abide by the verdict (ἐμμένειν τῇ διαίτῃ) or appeal (ἐφιέναι εἰς τὸ δικαστήριον).[5] A litigant suffered no real hardship by being allowed so brief a time in which to come to a momentous decision. In most cases both parties must have guessed the verdict sometime in advance. If there was no appeal, the arbitrator, before the end of the final day, filed his verdict in the office of the Forty.[6] The

[1] For the institution cf. *supra*, I, 347 ff.

[2] Arist. *Ath. Pol.* iii. 5.

[3] *Ibid.* liii. 2.

[4] ii. 30.

[5] Demos. xl. 31.

[6] *Ibid.* xxi. 85. The identity of τῶν ἀρχόντων in this passage, long uncertain, has been satisfactorily settled; cf. Lipsius, *op. cit.*, p. 68, n. 61; p. 627, n. 2.

Forty or, rather, the four concerned in the case—i.e., the four representing the tribe of the defendant[1]—certified the verdict. The importance of the notation by the Forty is seen in the efforts of Midias to persuade these officials *μεταγράφειν*.[2] The effect of the filing and the notation was to make the award a matter of record as the verdict of the Forty. The verdict was now as final and effective as their verdict in cases involving ten drachmas or less. It settled the case as effectively and finally as the verdict of a dicastery. If the defeated party failed to satisfy the judgment, the winner could levy on his goods and chattels or eject him from his real estate by a *δίκη ἐξούλης*.

But if, on the other hand, an appeal was entered, all the evidence and other documents in the case were sealed up in separate receptacles and sent to the four in charge of the case, who introduced it into a dicastery. As in modern appeals the evidence was the same as that heard by the court of first instance.[3]

Lipsius in 1898 wrote: "Dass *ἔφεσις* vom Spruch des Diaiteten Appellation ist, wird wohl von keiner Seite mehr bestritten."[4] This remained true until 1925 when the thesis of Wilamowitz that there was no appeal in Attic law was revived by Steinwenter, who, in regard to arbitration, says: "Wäre also die Heliaia ein Berufungsgericht, dann müsste der öffentliche Diaitet ordentlicher Richter erster Instanz sein und in seinem Amte bliebe vom schiedsrichterlichen Element nicht viel mehr als der Titel übrig."[5] The answer is emphatically that the arbitrator was, when he gave his

[1] Arist. *Ath. Pol.* liii. 2: *καὶ τὴν γνῶσιν τοῦ διαιτητοῦ γεγραμμένην ἐν γραμματείῳ προσαρτήσαντες, παραδιδόασι τοῖς τέτταρσι τοῖς τὴν φυλὴν τοῦ φεύγοντος δικάζουσιν.*

[2] Demos. xxi. 85. Ulpian on this passage says the four signed the verdict: *ἔδει τὴν διαιτηθεῖσαν δίκην ὑπογραφῆναι παρὰ τῶν ἀρχόντων.* Steinwenter (*op. cit.*, p. 64) suggests that each wrote *ἀνέγνων.*

[3] Arist. *Ath. Pol.* liii. 3: *οὐκ ἔξεστι δ' οὔτε νόμοις οὔτε προκλήσεσι οὔτε μαρτυρίαις ἀλλ' ἢ ταῖς παρὰ τοῦ διαιτητοῦ χρῆσθαι ταῖς εἰς τοὺς ἐχίνους ἐμβεβλημέναις.* For exceptions to this rule which are apparent rather than real cf. Bonner, *Evidence in Athenian Courts*, pp. 55 f.

[4] *Berichte der Sächsischen Gesellschaft*, L (1898), 157.

[5] *Op. cit.*, pp. 68 f.

award, an "ordentlicher Richter erster Instanz." As has been pointed out, the public arbitrator was a διαλλακτής so long as he sought a settlement by agreement. Failing this, he became a one-man court and decided the case on its merit according to the law and the evidence, and, like the dicasts, gave his award under oath.[1] These two distinct and separately exercised functions of the arbitrator (διαλλακτής and δικαστής) are clearly and succinctly set forth by Aristotle in the words ἐὰν μὴ δύνωνται διαλῦσαι, γιγνώσκουσι.[2]

Another indication of the judicial character of the arbitrator is shown by the fact that if a witness properly summoned did not appear, the litigant could at once file a δίκη λιπομαρτυρίου against him before the arbitrator. In the only known case, *Apollodorus* v. *Timotheus*,[3] Antiphanes, a witness for the plaintiff, was charged with λιπομαρτυρίου. Apollodorus says the arbitrator refused to give a decision against Antiphanes, the defaulting witness (οὐ κατεδιῄτα). It is impossible to say why the arbitrator did this. The best suggestion is that Apollodorus, relying on the promises of the witness to appear and testify, did not summon him properly.[4] Beyond this it is unprofitable to speculate what the arbitrator could have done had he adjudicated the case. Leisi's guess is as good as any:

> Über das Urteil ist es schwer, eine Vermutung aufzustellen; vielleicht enthielt es für den Beklagten die Alternative, die Gebühren des Klägers zurückzuerstatten und jetzt noch Zeugnis abzulegen, oder bei Unterlassung der Aussage eine grössere Busse, vielleicht an den Kläger, zu bezahlen; diese Busse wird wohl schätzbar gewesen sein, wie Meier, *Att. Proc.* 500, will.[5]

[1] Arist. *Ath. Pol.* lv. 5; Harrell, *Public Arbitration* ("University of Missouri Studies") pp. 21 f.

[2] Arist. *Ath. Pol.* liii. 2. Occasionally private arbitration closely approximated public arbitration in this respect: ἐκεῖνοι δ' εἶπον ἡμῖν, εἰ μὲν ἐπιτρέποιμεν αὐτοῖς ὥστε τὰ δίκαια διαγνῶναι, οὐκ ἂν ἔφασαν διαιτῆσαι· . . . . εἰ δ' ἐάσομεν αὐτοὺς γνῶναι τὰ συμφέροντα πᾶσιν ἔφασαν διαιτήσειν (Isaeus ii. 30).

[3] Demos. xlix. 19.

[4] Lipsius, *op. cit.*, p. 785. Leisi's suggestion (*Der Zeuge*, p. 51) that the promise to appear was not made before witnesses is to be rejected because a δίκη λιπομαρτυρίου would lie whether the witness promised or not. Cf. *supra*, pp. 141 f.

[5] *Op. cit.*, p. 52.

Nothing shows more clearly that an arbitrator was a real judge than the provision for redress in case a litigant felt he had been wronged by an arbitrator: *ἔστιν δὲ καὶ εἰσαγγέλλειν εἰς τοὺς διαιτητὰς ἐάν τις ἀδικηθῇ ὑπὸ τοῦ διαιτητοῦ, κἂν τινος καταγνῶσιν ἀτιμοῦσθαι κελεύουσιν οἱ νόμοι· ἔφεσις δ' ἐστὶ καὶ τούτοις.*[1] The nature of the wrongs contemplated is not specified, but it is clear that the *eisangelia* was not based upon the award itself, for that could be appealed. The grievances must have arisen out of the conduct of the case. In the forensic speeches the litigants have little to say about irregularities permitted or committed by the arbitrator in the conduct of the case. Apollodorus, in prosecuting Stephanus for perjury, says that when the original case came to trial on appeal an important document was not to be found in the *ἐχῖνος*. His suspicion, however, was not directed against the arbitrator but against the section of the Forty in charge of the case in whose custody the documents were kept.[2] Unfairness might be exhibited in granting or refusing continuances or failing to check obstructive tactics on the part of a litigant. It is wholly unlikely that the arbitrator would refuse to file and seal up any deposition or document offered. In any event, the severity of the penalty prescribed by law, complete *atimia*, shows that ample precautions were taken to prevent the abuse of the unusual judicial powers granted to a single individual. As there is no trace of an *euthyna* for arbitrators,[3] this impeachment was all the more necessary. The purpose in having it brought before the assembled arbitrators was to have the matter first examined by men familiar with the duties of an official arbitrator.

Lipsius[4] regards the words *ἔφεσις δ' ἐστὶ καὶ τούτοις* as proof that a condemned arbitrator had a right of appeal, but, as we shall see, similar phraseology in the case of *dokimasia*[5] does not, in the face of other considerations, mean that there

[1] Arist. *Ath. Pol.* liii. 6.

[2] Demos. xlv. 57–58.

[3] Lipsius, *op. cit.*, p. 232, n. 46.

[4] *Ibid.*, p. 231.

[5] Arist. *Ath. Pol.* xlv. 3; lv. 2; cf. *infra*, pp. 243 f.

was an appeal.[1] In the only recorded case of an adverse verdict by a board of arbitrators[2] the case did come before a dicastery, but there is no sure indication whether it was a matter of routine required by law or an appeal by Straton.[3] Demosthenes' account of the disfranchisement of the arbitrator Straton is given in a way to bring out the animosity of Midias against Straton.[4] An example is the virtual suppression by Demosthenes of the action of the dicastery who confirmed the verdict against Straton. If Straton was able to obtain *μήτε συγγνώμης μήτε λόγου μήτε ἐπιεικείας μηδεμιᾶς*,[5] the dicastery was not less blameworthy than Midias. Under these circumstances it is not to be expected that the story of Demosthenes would be of any assistance in determining whether *ἔφεσις* was an "appeal" or a "reference." Since he almost ignores the action of the dicastery in order to fasten all blame on Midias, it is not to be expected that there would be any allusion to an appeal to a dicastery by Straton.

Thus far there is nothing decisive in favor of either "appeal" or "reference" in this type of case. But there is one consideration that cannot be lightly dismissed even if it be not decisive. It is wholly contrary to Athenian ideas and practices to permit a group such as the arbitrators, assembled neither by election nor by lot nor subject to account at the end of the year, to impose such a severe penalty. The right of appeal may have proved to be a sufficient guaranty against abuse of delegated judicial power,[6] but a better guaranty was to make the verdict subject to review by a dicastery. If the verdicts of the *boulé* beyond five hundred drachmas had to be

[1] In favor of appeal in impeachments of arbitrators is the appeal from the decisions of individual arbitrators. These, however, dealt only with civil or private cases and involved no severe penalties.

[2] Demos. xxi. 81 ff.

[3] The words *καὶ τοῦτ' ἐχαρίσασθ' αὐτῷ* (*ibid.* 91), as was pointed out first by Fränkel (*Die attischen Geschworenengerichte*, pp. 73–74, n. 4), mean that the verdict of *atimia* was confirmed by a dicastery. Dobree's emendation *ἐχαρίσαθ' αὐτῷ* has not found favor, though King in his edition of 1901 prints it in his text.

[4] Cf. Ulpian on Demos. xxi. 83: *σαθρόν ἐστιν ὅλον τὸ περὶ τὸν Στράτωνα μέρος.*

[5] xxi. 90.

[6] Cf. Harrell, *op. cit.*, pp. 15 ff.

referred to a court, there is every reason to suppose that the same would be required in a sentence of *atimia* imposed by the board of arbitrators. The immediate effect of a sentence of *atimia* was the suspension of the arbitrator. Ulpian[1] says that his award in the case out of which the *eisangelia* arose was quashed. If this be true, this case would have to be referred *de novo* to another arbitrator.

One is interested to inquire how far arbitration was a success. On the basis of a passage in Demosthenes it is argued that the majority of cases were appealed: *καίτοι ἄτοπον δοκεῖ μοι εἶναι, εἰ οἱ μὲν ἄλλοι, ὅταν οἴωνται ἀδικεῖσθαι, καὶ τὰς πάνυ μικρὰς δίκας εἰς ὑμᾶς ἐφιᾶσιν.*[2] This is perhaps about what we should expect. If a litigant refused to accept a settlement where he would gain at least a modicum of his claims, he would most likely reject an adverse verdict on the merits of the case. But inevitably when two men had agreed to accept a settlement worked out by the arbitrator as *διαλλακτής*, there could be no question of an appeal. Hence we may assume that the success of arbitration lay in the activity of the arbitrators as *διαλλακταί* rather than as *δικασταί*.[3]

When the judicial function of the boulé was reduced to inflicting penalties of not more than five hundred drachmas, the boulé was required by law to send to a dicastery all cases which in its opinion called for a more severe penalty:

> *ὁ δὲ δῆμος ἀφείλετο τῆς βουλῆς τὸ θανατοῦν καὶ δεῖν καὶ χρήμασι ζημιοῦν, καὶ νόμον ἔθετο, ἄν τινος ἀδικεῖν ἡ βουλὴ καταγνῷ ἢ ζημιώσῃ, τὰς καταγνώσεις καὶ τὰς ἐπιζημιώσεις εἰσάγειν τοὺς θεσμοθέτας εἰς τὸ δικαστήριον, καὶ ὅ τι ἂν οἱ δικασταὶ ψηφίσωνται, τοῦτο κύριον εἶναι.*[4]

There is no specific mention in Aristotle of a *τέλος* within which the boulé was supreme. The law as cited by Aristotle merely forbids the boulé to impose fines (*χρήμασι ζημιοῦν*) and the reader is left to suppose that all penalties in the way of fines (*ἐπιζημιώσεις*) must come before the dicastery. But

[1] *Op. cit.* [2] xl. 31.

[3] One is reminded of Aristotle's distinction between an arbitrator and a judge in the *Rhetoric* i. 13. 19: *ὁ γὰρ διαιτητὴς τὸ ἐπιεικὲς ὁρᾷ, ὁ δὲ δικαστὴς τὸν νόμον· καὶ τούτου ἕνεκα διαιτητὴς εὑρέθη ὅπως τὸ ἐπιεικὲς ἰσχύῃ.*

[4] Arist. *Ath. Pol.* xlv. 1.

an incident in a Demosthenic speech shows that the boulé could fine up to five hundred drachmas on its own authority.[1] No importance is to be attached to the fact that the conclusions and decisions of the boulé to be referred to a dicastery are called καταγνώσεις, ἐπιζημιώσεις, and κρίσεις.[2] In effect καταγνώσεις, ἐπιζημιώσεις, and κρίσεις were mere recommendations arrived at by discussion and voting. The procedure is described by the speaker in the above-mentioned speech,[3] where the words καὶ ἐπειδὴ ἐν τῷ διαχειροτονεῖν ἦν ἡ βουλὴ πότερα δικαστηρίῳ παραδοίη ἢ ζημιώσειε ταῖς πεντακοσίαις, ὅσου ἦν κυρία κατὰ τὸν νόμον show that the defendant had no option in the matter. It depended entirely on the boulé to determine whether the case was to be ἐφέσιμος, i.e., subject to transfer to a dicastery, or settled by a fine of five hundred drachmas. The thesmothetai, on receiving the recommendation of the boulé, automatically referred the matter to a dicastery. The recommended penalty (*Strafantrag*) is analogous to the τίμημα proposed by a private prosecutor.[4] When the case came to trial in a dicastery one or more members of the boulé conducted the prosecution.[5]

Everybody is agreed that the transfer of the recommendation of the boulé to a dicastery is not an appeal. But it has been maintained[6] that fines within the τέλος of the boulé were subject to appeal on the basis of the following passage in Aristotle:[7]

κρίνει δὲ τὰς ἀρχὰς ἡ βουλὴ τὰς πλείστας, μάλισθ' ὅσαι χρήματα διαχειρίζουσιν· οὐ κυρία δ' ἡ κρίσις, ἀλλ' ἐφέσιμος εἰς τὸ δικαστήριον.

[1] Demos. xlvii. 43, quoted below. This is confirmed by a decree probably about 423 B.C. (*IG*², I, 76, ll. 58 ff.). It has been pointed out by Wilamowitz (*op. cit.*, II, 196) that ἐπί in composition in ἐπιζημιώσεις means fines "over and above," "in addition to" the permitted fine; cf. Lipsius, *op. cit.*, p. 45, n. 137.

[2] Cf. Arist. *op. cit.* xlv. 1, quoted above; Lysias xxii. 3.

[3] xlvii. 43; cf. Busolt-Swoboda, *op. cit.*, p. 1046, n. 2.

[4] Cf. Demos. xliii. 75, where the ἐπιβολή of a magistrate beyond his τέλος is called τίμημα.

[5] Lysias xxii. 3.

[6] Lipsius, *op. cit.*, p. 198; Busolt-Swoboda, *op. cit.*, p. 1046.

[7] *Ath. Pol.* xlv. 2.

ἔξεστι δὲ καὶ τοῖς ἰδιώταις εἰσαγγέλλειν ἢν ἂν βούλωνται τῶν ἀρχῶν μὴ χρῆσθαι τοῖς νόμοις. ἔφεσις δὲ καὶ τούτοις ἐστὶν εἰς τὸ δικαστήριον, ἐὰν αὐτῶν ἡ βουλὴ καταγνῷ.

The trial of officials here mentioned would seem to have arisen out of the monthly audits required of officials. These audits were conducted by the *logistai* of the senate chosen by lot from the senate,[1] as distinguished from the annual auditors allotted from the general citizen body. Presumably they handled the monthly audits much the same way as the annual ones were handled by the other *logistai*. If the auditors found nothing wrong, they so reported to the senate and the official was given, so to speak, a clean bill of health. If the auditors were not satisfied, or if a private individual brought a charge of illegality (*μὴ χρῆσθαι τοῖς νόμοις*), the senate tried the case. One would naturally suppose that in these cases also, although they affected officials only, the judicial power of the boulé would be the same as in cases involving private citizens, viz., its authority would be final in fines of five hundred drachmas or less.

If the passage refers to a real appeal we have here a distinction in the treatment of officials and ordinary citizens before the boulé, about which Lipsius is rightly disturbed. But he nevertheless perseveres in his opinion, "Wiewohl man nicht einsieht, warum allein bei den Beamten der Appellation gegen solche Bussen gedacht wird."[2] There is no parallel to such a distinction. It is wholly out of accord with the general Athenian attitude toward official responsibility to give appeal to an official condemned by the boulé and deny it to the rank and file of citizens. The theory of Lipsius involves two serious objections. A *τέλος* is fixed within which we are told that the boulé is *κυρία*.[3] Just what does *κυρία* mean? Aristotle constantly uses *κύριος* in the sense of "having full authority." Of the *ἀποδέκται* he says: *τὰ μὲν μέχρι δέκα δραχμῶν ὄντες κύριοι, τὰ δ' ἄλλ' εἰς τὸ δικαστήριον εἰσάγον-*

[1] *Ibid.* xlviii. 3: *κληροῦσι δὲ καὶ λογιστὰς ἐξ αὐτῶν οἱ βουλευταὶ δέκα τοὺς λογιουμένους ταῖς ἀρχαῖς κατὰ τὴν πρυτανείαν ἑκάστην.*

[2] *Op. cit.*, p. 198, n. 67.

[3] Demos. xlvii. 43, quoted above.

τες ἔμμηνα.[1] There is no doubt of the meaning of κύριοι here[2] or of κύριοι as used of decisions of the dicasteries.[3] Surely κυρία has in Demosthenes xlvii. 43 the same meaning as elsewhere, where it is used to characterize judicial authorities and their decisions.

The other objection is the discrimination in favor of an official whom the senate thinks guilty as contrasted with an ordinary citizen similarly situated. The apparent difficulty is easily dissolved by interpreting ἐφέσιμος to refer not to κρίσεις within the τέλος, of which Aristotle makes no mention, but to those that exceeded five hundred drachmas, where there was no appeal but an obligatory reference.

Aristotle mentions *ephesis* in connection with the *dokimasia* of the newly chosen members of the boulé and the nine archons. The outgoing boulé conducted this scrutiny first: δοκιμάζει δὲ καὶ τοὺς βουλευτὰς τοὺς τὸν ὕστερον ἐνιαυτὸν βουλεύσοντας καὶ τοὺς ἐννέα ἄρχοντας. καὶ πρότερον μὲν ἦν ἀποδοκιμάσαι κυρία, νῦν δὲ τούτοις ἔφεσίς ἐστιν εἰς τὸ δικαστήριον.[4] Aristotle seems to say here that *ephesis* in his day was permitted only to those who were rejected. In other words, this was a real appeal. But in a later and more elaborate statement he puts the matter in a different light:

> δοκιμάζονται δ' οὗτοι πρῶτον μὲν ἐν τῇ βουλῇ τοῖς πεντακοσίοις, πλὴν τοῦ γραμματέως, οὗτος δ' ἐν δικαστηρίῳ μόνον, ὥσπερ οἱ ἄλλοι ἄρχοντες (πάντες γὰρ καὶ οἱ κληρωτοὶ καὶ οἱ χειροτονητοὶ δοκιμασθέντες ἄρχουσιν), οἱ δ' ἐννέα ἄρχοντες ἔν τε τῇ βουλῇ καὶ πάλιν ἐν δικαστηρίῳ. καὶ πρότερον μὲν οὐκ ἦρχεν ὄντιν' ἀποδοκιμάσειεν ἡ βουλή, νῦν δ' ἔφεσίς ἐστιν εἰς τὸ δικαστήριον, καὶ τοῦτο κύριόν ἐστι τῆς δοκιμασίας.[5]

Lipsius[6] alone among the scholars who have dealt with *dokimasia*[7] does not believe that the nine archons were required to undergo two scrutinies. But the contrast between the officials who appeared ἐν δικαστηρίῳ μόνον and the nine archons

[1] *Ath. Pol.* lii. 3. [2] Lipsius, *op. cit.*, p. 100.

[3] Arist. *Ath. Pol.* xlv. 1; cf. Plato *Crito* 50B; Andoc. i. 88.

[4] *Ath. Pol.* xlv. 3. [5] *Ibid.* lv. 2. [6] *Op. cit.*, pp. 271 f.

[7] Busolt, *Die griechischen Staats- und Rechtsaltertümer*, p. 223; Busolt-Swoboda, *op. cit.*, pp. 470, 1045; Hermann-Thumser, *Lehrbuch der griechischen Staatsaltertümer*, p. 607.

who were scrutinized *πρῶτον μὲν ἐν τῇ βουλῇ . . . . καὶ πάλιν ἐν δικαστηρίῳ* leaves no doubt that the *dokimasia* in the court was obligatory and not the result of appeal. But the matter is finally settled by a passage in Demosthenes: *ᾤετο ὁ Σόλων . . . . τοὺς μὲν θεσμοθέτας τοὺς ἐπὶ τοὺς νόμους κληρουμένους δὶς δοκιμασθέντας ἄρχειν ἔν τε τῇ βουλῇ καὶ παρ' ὑμῖν ἐν τῷ δικαστηρίῳ.*[1] So precise an expression as *δὶς δοκιμασθέντας* is quite inappropriate if the second *dokimasia* depended upon occasional appeals. Still further confirmation not hitherto noticed in this connection may be found in Aristotle's account of the procedure in *dokimasia*. After the candidate-elect answers the questions put to him and produces his witnesses, the official in charge asks:

> "Does anybody wish to bring a charge against this man?" And if any accuser is forthcoming, he is given a hearing and the man on trial an opportunity of defense, and then the official puts the question to a show of hands [*ἐπιχειροτονία*] in the Council or to a vote by ballot [*ψῆφος*] in the Jury-court; but if nobody wishes to bring a charge against him, he puts the vote at once; formerly one person used to throw in his ballot-pebble, but now all are compelled to vote one way or the other about them, in order that if anyone being a rascal has got rid of his accusers, it may rest with the jurymen to disqualify him.[2]

This passage shows the manner of voting in the boulé and the dicastery when an accuser appears, a show of hands in the boulé and a ballot in the dicastery. This process applies both to those who are scrutinized in the dicastery only and to those scrutinized first in the boulé, then in the dicastery. But the words *ἐὰν δὲ μηδεὶς βούληται κατηγορεῖν, εὐθὺς δίδωσι τὴν ψῆφον* show that in all cases the dicastery alone can finally accept a candidate.

The double *dokimasia* required both of members of the boulé and of the nine archons effectively disposes of the question of an appeal. *Ephesis* in both cases means obligatory reference to a court.[3] Aristotle's statement that there was

[1] xx. 90; cf. Cloché, *REG*, XXXIV, 240, n. 1.

[2] Arist. *Ath. Pol.* lv. 4 (trans. Rackham).

[3] Lipsius, in his preoccupation with the theory that *ephesis* in Aristotle always means "appeal," brushes aside too lightly the opposing arguments.

ephesis for those rejected by the boulé[1] is, as we have seen, apparently inconsistent with his later statement that the dicastery is the final authority in *dokimasia:* καὶ τοῦτο (τὸ δικαστήριον) κύριόν ἐστι τῆς δοκιμασίας.[2] The discrepancy, apparent rather than real, may be due to the brevity and succinctness of the statement. It was quite as important from the standpoint of democracy that a dicastery should check the acceptances as well as the rejections of the boulé to prevent undesirable citizens getting into office by bribing intending accusers: ἵνα, ἄν τις πονηρὸς ὢν ἀπαλλάξῃ τοὺς κατηγόρους, ἐπὶ τοῖς δικασταῖς γένηται τοῦτον ἀποδοκιμάσαι.[3]

Athenian magistrates were permitted to fine anyone who obstructed them either actively or passively in the performance of their official duties.[4] If the fine (ἐπιβολή) exceeded a fixed limit (τέλος), the magistrate had to take the matter to a dicastery, which could either confirm or remit the fine. It has been argued that even a fine within the *telos* could be appealed. There is no direct evidence to support this view; but there are some indications that deserve consideration.[5] In the law cited by Demosthenes the only reference to the court is when the sum exceeds the *telos*, and then it becomes and is called a *timema*. There is no mention of an *ephesis*. Also in point is a case in Lysias which has already been discussed,[6] and it is unnecessary to repeat the arguments used there. So far as this case goes, it may be confidently asserted that there is no feature of the case that cannot easily be explained by assuming that in this case the *epibolé* was beyond the competence of the magistrate and required court action to confirm it. The fact that the defendant nowhere

[1] *Ath. Pol.* xlv. 3. [2] *Ibid.* lv. 2. [3] *Ibid.* 4.

[4] Demos. xliii. 75: ἐὰν δέ τις ὑβρίζῃ ἢ ποιῇ τι παράνομον, κύριος ἔστω (ὁ ἄρχων) ἐπιβάλλειν κατὰ τὸ τέλος. ἐὰν δὲ μείζονος ζημίας δοκῇ ἄξιος εἶναι, προσκαλεσάμενος πρόπεμπτα καὶ τίμημα ἐπιγραψάμενος ὅ τι ἂν δοκῇ αὐτῷ, εἰσαγαγέτω εἰς τὴν ἡλιαίαν.

[5] The argument drawn from a decree (*IG*², II, 1177) of the deme Piraeus is not pertinent. The fine in this case to be imposed is not the normal fine as in the case of other magistrates. Here the demarch is instructed and empowered to inflict a fine in case of certain infractions and to take the matter to court. In point of fact, by the terms of the decree he becomes a public prosecutor and the *epibolé* is a *timema*.

[6] ix; cf. *supra*, I, 279 ff.

explicitly mentions this feature of the case is no objection to this view. In fact, the words *οὔτε εἰς δικαστήριον εἰσελθόντες τὰ πραχθέντα*[1] imply very clearly that the action of the generals was not *κυρία* until taken to a court by them and not by the defendant by way of appeal. The case finally reached the court by an *apographé*[2] brought by someone who hoped to profit by it.

The word *ἔφεσις* occurs in an inscription of 446–445 B.C. recording the terms granted to the Chalcidians after their unsuccessful attempt to secede from the empire. The so-called resolution of Archestratus, an amendment to the act of settlement, is as follows:

Ἀρχέστρατος εἶπε· τὰ μὲν ἄλλα καθάπερ Ἀντικλῆς· τὰς δὲ εὐθύνας Χαλκιδεῦσι κατὰ σφῶν αὐτῶν εἶναι ἐν Χαλκίδι καθάπερ Ἀθήνησιν Ἀθηναίοις, πλὴν φυγῆς καὶ θανάτου καὶ ἀτιμίας. περὶ δὲ τούτων ἔφεσιν εἶναι Ἀθήναζε ἐς τὴν ἡλιαίαν τὴν τῶν θεσμοθετῶν κατὰ τὸ φσήφισμα τοῦ δήμου.[3]

The word *εὐθύνας* here has not the technical Athenian meaning of "audit" but means "legal punishment." There are three possible procedures suggested by *ephesis* here: it may mean appeal in the true sense, as Lipsius believes;[4] it may mean that sentences of death, banishment, or *atimia* imposed in local courts must be taken to Athens for review by a dicastery; it may mean that cases involving the penalties of death or exile or loss of civil and political rights, whether *τίμητοι* or *ἀτίμητοι*, were reserved cases to be tried in Athens in the first instance.

Pseudo-Xenophon devotes considerable space to a discussion of Athenian judicial control of the empire. The text of the first sentence of the passage is evidently corrupt, but the significant parts of the discussion are abundantly clear.

With regard to the allies, the popular party has a hatred for, and brings, as appears, malicious accusations against the best men among them, knowing that the ruler must in any case be hated by the ruled, and that if the

[1] Lysias ix. 11. [2] Lipsius, *op. cit.*, p. 299.

[3] *IG*², I, 39; Hicks and Hill, *Greek Historical Inscriptions*, 40; Tod, *Greek Historical Inscriptions*, 42; Dittenberger, *Sylloge inscriptionum Graecarum*², 17.

[4] *Op. cit.*, p. 970.

rich and responsible classes in the cities become strong, the ascendancy of the democratic party at Athens will endure for but a very short time; for this reason, then, they deprive the good of their civil rights and property, and get them exiled, and put them to death, and they help on the bad.[1]

It is clear from these words that the Athenians in their own courts condemned individual allies to disfranchisement, banishment, death, and heavy fines: *τοὺς μὲν χρηστοὺς ἀτιμοῦσι καὶ χρήματα ἀφαιροῦνται καὶ ἐξελαύνονται καὶ ἀποκτείνουσι.* Kalinka takes the words *χρήματα ἀφαιροῦνται* to refer to confiscation of property that followed or rather was included in the sentences of banishment and death. The order of the words is against this view as well as the fact that a sentence of death or exile against a citizen of a subordinate state condemned for high crimes or misdemeanors surely included confiscation of property. Consequently, there was no occasion to mention it.

In the amendment of Archestratus we find no mention of confiscation of property, merely banishment, death, and disfranchisement, but the amendment must be read in connection with the decree of Diognetus where in the oath of the boulé and the dicasts property is mentioned: *οὐδὲ χρήματα ἀφαιρήσομαι ἀκρίτου οὐδενός.*[2] It would seem likely rather that the words *χρήματα ἀφαιροῦνται* refer to ruinous fines such as are contemplated in Aristophanes: *τῶν δὲ συμμάχων ἔσειον τοὺς παχεῖς καὶ πλουσίους, αἰτίας ἂν προστιθέντες.*[3] Here there can be little question of anything but a fine. In any event, the passage in Pseudo-Xenophon shows that the penalties

[1] *Const. of Athens* i. 14 ff. (trans. Brooks, using text of Kalinka).

[2] *IG*², I, 39, ll. 8–9.

[3] *Peace* 639–40. A passage in the *Wasps* 287–89 also refers to wealthy and influential inhabitants of the Thraceward cities who were suspected of being disaffected and were harassed by perpetual persecutions, as Rogers points out:

καὶ γὰρ ἀνὴρ παχὺς ἥκει
τῶν προδόντων τἀπὶ Θρᾷκης·
ὃν ὅπως ἐγχυτριεῖς.

Starkie, following Müller-Strübing, attempts to identify the *ἀνὴρ παχύς* with Thucydides, but the arguments are far from convincing. Cf. also *Knights* 262 ff., and Antiph. v. 78, where a wealthy citizen of Mytilene is said to have emigrated to Aenus to escape the sycophants.

of disfranchisement, banishment, and death were imposed upon guilty citizens of subordinate cities by Athenian courts.

We learn from the Archestratus amendment that there was an *ephesis* to Athens for natives in case of serious crimes involving penalties of death, banishment, and disfranchisement. Lipsius believes that *ephesis* here as elsewhere means appeal, not reference. The passage of Pseudo-Xenophon already quoted is a general statement that the Athenians banished, executed, and disfranchised citizens of the subordinate state. But in a later passage where he ironically justifies this system of judicial control he says: "While remaining at home, without sending out ships, they manage the allied cities and protect the commons while they ruin their opponents in the courts." He means, of course, the Athenian courts. The alternative to trial at Athens is trial in the local courts. "If each of the allies tried their lawsuits at home, out of hatred for Athenians, they would have destroyed those of their own people most friendly to the Athenian commons."[1] In brief, by this system the Athenians protected pro-Athenians from death, banishment, or disfranchisement by sentence of the local court and at the same time saw to it that they had the opportunity to punish anti-Athenians by imposing these severe penalties in their own courts. The only certain way to carry out such a system without fail was to reserve all such cases for trial in Athens. According to Pseudo-Xenophon, this is precisely what they did: *τοὺς συμμάχους ἀναγκάζουσι πλεῖν ἐπὶ δίκας Ἀθήναζε.*[2] If Pseudo-Xenophon is right, *ephesis* in the Chalcidian act of settlement means not appeal but obligatory reference. It is true Pseudo-Xenophon is writ-

[1] *Const. of Athens* i. 16. Opinion is divided as to whether or not a democratic form of government was the rule in Athenian dependencies; cf. Kalinka, *Die Pseudoxenophontische Ἀθηναίων Πολιτεία*, pp. 151, 153; Walker, *CAH*, V, 471–72; Robertson, *CP*, XXVIII, 50–53. But in any event there was always a more or less dangerous pro-Spartan and oligarchic group. Athens' judicial restrictions were intended to prevent or check *stasis*.

[2] *Const. of Athens* i. 16; cf. Athenaeus ix. 407*b*; *καθ' ὃν δὲ χρόνον θαλασσοκρατοῦντες Ἀθηναῖοι ἀνῆγον εἰς ἄστυ τὰς νησιωτικὰς δίκας.* It was common Greek practice to oblige subordinate states to try their cases in the courts of the sovereign state; cf. Herod. v. 83.

ing twenty years later than the Chalcidian decree and there may have been changes, but the decree says explicitly that the *ephesis* was *κατὰ τὸ φσήφισμα τοῦ δήμου*. This is taken to mean that *ephesis* in such cases by a general law was applicable to all subordinate cities.[1] The case of Mende, where upon the suppression of a revolt in 423 B.C. the Mendeans were permitted to try in their own courts any of their citizens suspected of causing the revolt, is an exception that proves the rule.[2]

It is clear that there was considerable current criticism of the Athenian judicial restrictions in overseas communities. The Athenian apologist in Sparta on the eve of the war devotes a paragraph to the charge that imperial Athens was fond of adjudication (*φιλοδικεῖν*).[3] His defense rests entirely upon the reciprocity involved in suits under specific treaties which Athens had negotiated both with her allies and with others (*ἐν ταῖς ξυμβολαίαις δίκαις*). Nothing is said about criminal cases. If the *ephesis* to Athens was optional, it is difficult to see why neither the fifth-century apologist nor Isocrates[4] in the fourth century said so. It would not have afforded a complete rejoinder to criticism either current or retrospective, but it would have confused the issue in favor of Athens. No rhetorician worthy of the name could have missed it.

The only sure way for the Athenians to be certain that these special cases would actually be brought before their courts was to make the *ephesis* obligatory. It was not enough

[1] Robertson, *Administration of Justice in the Athenian Empire* ("University of Toronto Studies in History and Economics," Vol. IV, No. 1), p. 55, discusses the question with a citation of the literature.

[2] Thuc. iv. 130. 7.

[3] *Ibid.* i. 77; cf. Bonner, *CP*, XIV, 284–86.

[4] The impression one gains from Isocrates is that overseas cases were tried in Athens not at the option of the litigants concerned but by the will of Athens; cf. Isoc. iv. 113; xii. 63, 66. The last passage is as follows (trans. Norlin): "For example, in the present instance, if they bring up the fact that the lawsuits of the allies were tried in Athens, is there anyone so slow of wit as not to find the ready retort that the Lacedaemonians have put to death without trial more of the Hellenes than have ever been brought to trial and judgment here since the founding of our city?" The passages cited above from Aristophanes convey the same impression.

to rely upon appeal. There could be no certainty that such cases would be appealed. It may at first sight seem certain that no man would fail to appeal against such severe penalties. But it would be rash to assume that means could not be found to dissuade a man from appealing a sentence of *atimia*. If courts could be found to disfranchise a man, means would not be lacking to put pressure upon him to submit to the decision. With the death penalty it would be otherwise; no man would submit to death if an appeal might save him. But an appeal could be prevented in another way. The Athenian boulé on more than one occasion[1] condemned a man to death *ultra vires* and executed him without referring the matter to a dicastic court as the law required. What the boulé could do in Athens an overseas court could certainly do. These risks might have been avoided by a strict system of supervision and reprisals, but in such cases an ounce of prevention is worth a pound of cure. It was simpler to follow the Greek theory of political and judicial subordination and compel "their dependents to sail to Athens for the adjudication of suits," as Pseudo-Xenophon says they did. These various considerations should dispose of overseas appeals.

There remains a further problem. Just how was it possible to determine what cases came under the exception? Where the law fixed the penalty as either death, or exile, or *atimia*, the matter would be simple; but where the penalty was assessed by court, it would be necessary to wait until the trial was over and then send the case to Athens for retrial. A much surer and more practical procedure would be not to allow the local courts to go through the motions of trying such cases. Where the law provided one of the forbidden punishments or the prosecution asked for it as the *timema*, at the *anakrisis* or preliminary inquiry the case could be assigned for trial in Athens.[2] This is precisely the procedure of the *boulé*.

[1] Arist. *Ath. Pol.* xl. 2; cf. Lysias xxii. 2.

[2] The entire conduct of the *anakrisis* could scarcely be in the hands of Athenian officials, for it would have been necessary for them to handle all criminal cases, a formidable task. Cf. Lecrivain, in Darem.-Saglio, *s.v.* "Ephesis": "On sait que, dans la première ligue maritime, Athènes a réservé à ses héliastes le jugement de tous

It did not try a serious case but recommended a suitable penalty and sent the case to a dicastery.[1]

Unfortunately there is only one recorded case in which a crime committed overseas was tried in Athens.[2] Euxitheus, a citizen of Mytilene, was tried by the process of *apagogé* for the killing of Herodes, who appears to have been an Athenian citizen resident in Mytilene.[3] Probably he was one of those who emigrated from Athens as a settler on confiscated land. That there was some official investigation of the disappearance of Herodes cannot be questioned. No freeman could be tortured without official sanction and supervision. It was quite otherwise with the slave who was the property of the relatives of Herodes. Euxitheus was never himself present at any inquiry so far as is known from his own account. This was due in part to the fact that he had gone to Aenus, where his father resided, without any notion that he would be suspected. Furthermore, the torture of the slave at first and the torture of the freeman were intended in all probability to secure a confession of their guilt or complicity. When this failed to solve the disappearance of Herodes, the suspicions of his friends were directed toward Euxitheus. The letter,[4] whether genuine or forged, and admissions of a slave constituted the basis of action.[5] But this case gives no real help in determining whether the investigation was conducted by local or Athenian overseas officials. There is a wide divergence of opinion as to the identity of *τοῖς ἄρχουσι* in section 47, but we may be certain that the investigation of the disappearance of an Athenian resident in Mytilene after the

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les procès et délits qui ont trait aux institutions fédérales. Il en est de même des crimes privés qui entraînent la peine de mort, l'atimie, l'exil; *l'instruction de l'affaire peut avoir lieu dans la ville soumise, mais le jugement appartient aux héliastes*, présidés par les archontes thesmothètes."

[1] Cf. *supra*, pp. 240 f.

[2] Antiph. v.

[3] Cf. Jebb, *Attic Orators*, I, 55.

[4] Antiph. v. 53.

[5] It is interesting to observe that Euxitheus meets it not by questioning the writing but by *eikota* arguments; cf. Bonner, *Evidence in Athenian Courts*, p. 80. On two occasions it was claimed that slaves could detect changes made in documents they had written (Demos. xxix. 21; xxxiii. 17 ff.).

revolt would not be trusted wholly to local officials.[1] But even if it could be shown that they were Athenian overseas officials, it is of little value, because the crime involved not natives of Mytilene but a native and an Athenian. The case affords no help in determining the procedure in overseas crimes involving natives only.

The matter may be approached from another angle. If Athens required certain reserved cases to be tried in Athens, there must have been some agency to see that the law was enforced. It is known that Athens had a very large number of overseas officials.[2] Among these overseas officials the *ἐπίσκοποι* receive considerable attention from the lexicographers,[3] but all they tell us is that these men were sent to the subordinate cities *ἐπισκέψασθαι τὰ παρ' ἑκάστοις* or *τὰ τούτων πράγματα*. To this information, which is mostly etymological, Aristophanes adds a valuable hint. In the *Birds*[4] an *episkopos* appears with a pair of voting urns, saying that he has been chosen by lot and showing his credentials. It is an ill business extracting information about Attic legal institutions from a comedy, but the association of an *episkopos* with judicial ballot boxes at least justifies the surmise that in the subordinate cities the *episkopos* had some relation to the imperial judicial system. He is introduced merely as a figure common

[1] Lipsius (*op. cit.*, p. 873, n. 23) contends that the reference is to the Eleven, while the view that the Athenian magistrates resident in Mytilene are meant is advanced by Böckh, *Staatsh. d. Athener*, I, 480, n. *e;* Busolt, *Griech. Gesch.*, III, 227; Fränkel, *De condicione, jure, jurisdictione sociorum Atheniensium*, p. 17; Gilbert, *Const. Antiq.*, p. 432, n. 1. Robertson (*op. cit.*, pp. 57–64) has a full discussion of Athenian overseas officials. *IG*², I, 60 reads *δεχομένους* instead of the restoration *ἐπιμελητάς* or *ἐπισκόπους* known to Robertson in 1924.

[2] Arist. *Ath. Pol.* xxiv. 3 puts the number at seven hundred. This number has aroused much suspicion. The latest editors, Kenyon (Oxford) and Opperman (Teubner), both query it. Sandys accepts it without question and lists enough types of overseas officials to quiet any doubts. Apart from cleruchies which had officials, there were well-nigh one hundred and forty subordinate cities in the empire (Meritt and West, *Harvard Studies*, XXXVII, 98). Kalinka (*op. cit.*, pp. 168 f.) thinks the number none too large. It may be an accidental repetition in round numbers of the number of home officials. But in any event the number must have been very large, perhaps more than seven hundred.

[3] Cf. Robertson, *op. cit.*, p. 60, for full citations.

[4] 1032 and 1053.

throughout the Athenian Empire.[1] It has been plausibly suggested that the *episkopoi* were charged with the task of checking the lists of criminal cases and making sure that those in which the law required or the prosecution demanded a forbidden penalty were sent to Athens for trial.[2] But even if this conjecture be unacceptable, its rejection in no way invalidates the conclusion that *ephesis* in the overseas cases meant reference and not appeal.[3]

The ecclesia, as the supreme body in the state, exercised the pardoning power which in modern states is the privilege of monarchs or presidents. In the exercise of this power the ecclesia quashed or annulled the verdicts of the dicasteries. Alcibiades, for example, when charged with impiety, was condemned to death *in absentia* by a dicastery.[4] Later the assembly voted his return.[5] Dorieus, a Rhodian, became a rebel and joined the Spartans during the Peloponnesian War. He was summoned to Athens for trial and, failing to appear, was condemned *in absentia*.[6] Xenophon does not say that he was tried by a dicastery, but it was the general practice of Athens to try traitors from overseas before a court presided over by the thesmothetai.[7] Eventually Dorieus was captured in a naval engagement and taken to Athens. According to law, the sentence already passed upon him could have been executed without further ado. But, owing to the fact that he was a famous athlete, he was released by the assembly.[8] Beyond this we cannot follow the case. It is idle to inquire what was Dorieus' status in the future. At all events his sentence of death was quashed by the assembly. This was not at all an appeal in the regular sense, but rather a pardon granted to

[1] Cf. Robertson, *op. cit.*, p. 61. Whatever view one may take of the *Birds*, it reflects a number of the features of the Athenian imperial system.

[2] *Ibid.*, p. 62.

[3] For a discussion of reference to Athens of cases from subordinate cities under the second Athenian Empire cf. *supra*, I, 317.

[4] Thuc. vi. 61. 7; for details cf. *supra*, I, 301 f.

[5] Thuc. viii. 97. 3.

[6] Xen. *Hell.* i. 5. 19.

[7] Cf. Robertson, *op. cit.*, p. 68.

[8] Paus. vi. 7. 4–5.

a convicted rebel permitted to appear before the assembly[1] as a prisoner of war to make a plea for pardon. No doubt the friends who were instrumental in saving him from immediate execution brought the case before the assembly and supported his plea.

Antiphon[2] refers to a different type of case, where the Hellenic treasurers were all condemned for peculation. All but one, Sosias, were executed before it was discovered that none of them was guilty. Normally one would expect that the discovery of new evidence would result in a new trial and acquittal if the dicastery deemed the evidence reliable. But in this case the evidence was presented to the ecclesia and Sosias was released from the custody of the Eleven.

τοῦ δ' ἑνὸς τούτου (Σωσίαν ὄνομά φασιν αὐτῷ εἶναι) κατέγνωστο μὲν ἤδη θάνατος, ἐτεθνήκει δὲ οὔπω· καὶ ἐν τούτῳ ἐδηλώθη τῷ τρόπῳ ἀπωλώλει τὰ χρήματα, καὶ ὁ ἀνὴρ ἀπήχθη ὑπὸ τοῦ δήμου τοῦ ὑμετέρου παραδεδομένος ἤδη τοῖς ἕνδεκα.[3]

Here the ecclesia reverses a court verdict on the basis of new evidence.

In the cases of Dorieus and Alcibiades the question of their guilt or innocence played no part in the action of the assembly. Dorieus was released because the Athenians admired his athletic prowess. There was so little certainty of the guilt of Alcibiades in the first place that his enemies feared to try him while the army recruited for the Sicilian campaign was still in the city. The reasons for his recall were political. Sosias, however, was proved to be innocent to the satisfaction of the ecclesia. To this extent the case resembles a retrial rather than a pardon.

The amnesty laws passed in Athens on rare occasions granted pardons in wholesale fashion, with a few traditional exceptions,[4] to all who were wholly or partially disfranchised (*ἄτιμοι*) by the courts. Sometimes the *atimia*, complete or

[1] *Ibid.*: *ὡς δὲ ἐς ἐκκλησίαν συνελθόντες ἄνδρα οὕτω μέγαν καὶ δόξης ἐς τοσοῦτο ἥκοντα ἐθεάσαντο ἐν σχήματι αἰχμαλώτου, μεταπίπτει σφίσιν ἐς αὐτὸν ἡ γνώμη καὶ ἀπελθεῖν ἀφιᾶσιν.*

[2] v. 69–70. [3] *Ibid.* 70.

[4] For the exceptions to the amnesty law cf. *supra*, I, 104 ff.

partial, was prescribed by legal enactment as a punishment.[1] Again, if a man failed to pay fines or damages assessed by a court he finally became *atimos*.[2] In these types of cases the unsuccessful defendant is restored by the amnesty to all the rights and privileges of full citizenship and his property is exempt from execution.

Besides the quashing of court verdicts, the amnesty law halted pending suits that might have exposed the unsuccessful defendant to *atimia*. As we should say, the case was nolprossed by action of the ecclesia. The only cases of this class mentioned in the decree of Patroclides were *γραφαὶ περὶ εὐθυνῶν* which had been accepted by the *euthynoi* but had not yet been brought before a dicastery.[3]

The intervention of the ecclesia in the case of Lysimachus of the Scaffold already discussed[4] presents some interesting features in this connection. Aristotle[5] gives the impression that the condemnation of Lysimachus by the boulé was the occasion for the enactment of the law restricting the powers of the boulé by depriving it of the right to inflict the death penalty, imprisonment, or fines. But it is more likely to have been the occasion of the re-enactment of the law after the revolutions. Eumelides is said to have rescued Lysimachus almost from the hands of the executioner who was on the point of carrying out the sentence of the boulé. According to Aristotle, a trial was subsequently held in a dicastery and Lysimachus was acquitted. At the same time a law was passed or revived restricting the judicial powers of the boulé. On what authority did Eumelides act? It is not likely that even the most determined citizen could force his way into prison and rescue a condemned criminal for whom the jail officials would be responsible with their lives. It is more likely that the matter was first brought up in the ecclesia. Perhaps on the motion of Eumelides, Lysimachus was turned over to the proper authorities (the thesmothetai) and tried before a dicastery. To insure against further *ultra vires* actions on the

[1] Andoc. i. 74 ff.

[2] *Ibid.* 73.

[3] *Ibid.* 78.

[4] *Supra*, I, 337.

[5] *Ath. Pol.* xlv. 1.

part of the boulé the law was re-enacted.[1] Here the ecclesia interfered not to quash a verdict but to insure that a man illegally condemned should be tried by due process of law. Indeed, the dicastery might have reached the same verdict as the boulé and have condemned Lysimachus to death.

The doctrine of the finality of *res judicata* and *autre fois acquit* prevailed in Athens as in modern communities: *οἱ νόμοι δὲ οὐκ ἐῶσι δὶς πρὸς τὸν αὐτὸν περὶ τῶν αὐτῶν οὔτε δίκας οὔτ' εὐθύνας οὔτε διαδικασίαν οὔτ' ἄλλο τοιοῦτ οὐδὲν εἶναι.*[2] But Euxitheus, a client of Antiphon, claims that if the prosecutors fail to convict him as a malefactor (*κακοῦργος*) for killing Herodes, they can try him again as a homicide for the same offense. Indeed, he himself asks for an acquittal because he is being tried illegally as a *kakourgos*, and he expresses his willingness to submit to a trial for murder.[3] As the prosecution had put death as the *timema*,[4] Euxitheus would, on the second trial, be put twice in jeopardy of his life. There is a theoretical distinction enough to save the rule of *res judicata* in law, but little practical difference between the two trials. When Euxitheus says *ἔπειτα τίμησίν μοι ἐποίησαν, τοῦ νόμου κειμένου τὸν ἀποκτείναντα ἀνταποθανεῖν*,[5] his slender justification for drawing a distinction between death by *timesis* and death by law is that in the former case the jury might convict and choose a lesser penalty proposed by the defendant himself. Hence the slain man would be deprived of his due. Antiphon relies upon the religious feeling he hopes to stir to obscure the sophistry of his plea. But *ex parte* statements must be dealt with cautiously. There is no certainty that if acquitted Euxitheus could have been tried again,[6] nor does the case show for certain that a man could be placed twice in jeopardy for the same offense.

The procedures for examining the accounts of retiring

[1] For the tendency of the boulé to overstep its power cf. *supra*, I, 338–39.

[2] Demos. xx. 147. Plato (*Crito* 50B) refers to the law *ὃς τὰς δίκας τὰς δικασθείσας προστάττει κυρίας εἶναι.* Cf. Demos. xviii. 224; xxix. 55.

[3] Antiph. v. 94–96. [4] *Ibid.* 10, 59, 63, 85. [5] *Ibid.* 10.

[6] Cf. *supra*, pp. 211 ff., for a discussion of *apagogé* in murder trials.

officials present a curious feature which seems on the face of it to transgress the principle of *res judicata*. The *logistai*, in addition to the financial accounts, investigated offenses which were punishable with a fine. Aristotle[1] mentions three: peculation (*κλωπῆς*), acceptance of bribes (*δώρων*), and maladministration (*ἀδικίου*).[2] This list of offenses seems exhaustive, as Lipsius holds.[3] Each official was brought before a court for discharge or trial in connection with his accounts. If the *logistai* and the *synegoroi* found no fault with the official's accounts and actions in office, they took him before a court and recommended his discharge. The herald, however, asked *τίς βούλεται κατηγορεῖν*.[4] If any irregularities were discovered by the *logistai* or disclosed by a volunteer prosecutor, there was a regular trial with fines in case of conviction.

But neither the sealed discharge nor a conviction fully released the former official. He had still to face possible charges, private and public, before the *euthynoi*. Aristotle is quoted to facilitate discussion of some important points:

κληροῦσι δὲ καὶ εὐθύνους, ἕνα τῆς φυλῆς ἑκάστης, καὶ παρέδρους δύο ἑκάστῳ τῶν εὐθύνων, οἷς ἀναγκαῖόν ἐστι ταῖς ἀγοραῖς κατὰ τὸν ἐπώνυμον τὸν τῆς φυλῆς ἑκάστης καθῆσθαι, κἄν τις βούληταί τινι τῶν τὰς εὐθύνας ἐν τῷ δικαστηρίῳ δεδωκότων, ἐντὸς τριῶν ἡμερῶν ἀφ' ἧς ἔδωκε τὰς εὐθύνας, εὔθυναν, ἄν τ' ἰδίαν ἄν τε δημοσίαν, ἐμβαλέσθαι, γράψας εἰς πινάκιον λελευκωμένον τοὔνομα τό τε αὐτοῦ καὶ τὸ τοῦ φεύγοντος καὶ τὸ ἀδίκημ' ὅ τι ἂν ἐγκαλῇ, καὶ τίμημα ἐπιγραψάμενος ὅ τι ἂν αὐτῷ δοκῇ, δίδωσιν τῷ εὐθύνῳ· ὁ δὲ λαβὼν τοῦτο καὶ ἀνακρίνας, ἐὰν μὲν καταγνῷ, παραδίδωσιν τὰ μὲν ἴδια τοῖς δικασταῖς τοῖς κατὰ δήμους, τοῖς τὴν φυλὴν ταύτην εἰσάγουσιν, τὰ δὲ δημόσια τοῖς θεσμοθέταις ἐπιγράφει, οἱ δὲ θεσμοθέται, ἐὰν παραλάβωσιν, πάλιν εἰσάγουσιν τὴν εὔθυναν εἰς τὸ δικαστήριον καὶ ὅ τι ἂν γνῶσιν οἱ δικασταί, τοῦτο κύριόν ἐστι.[5]

The phrase *τῶν τὰς εὐθύνας ἐν τῷ δικαστηρίῳ δεδωκότων* should include not only those who received a discharge from the court on the recommendation of the *logistai* but those who had been tried either at the instance of the *logistai* or at the

[1] *Ath. Pol.* liv. 2.

[2] The meaning of *ἀδικίου* is not explicit. Kenyon renders it "unfair dealing"; Rackham translates "maladministration." The offenses contemplated cannot be serious in Athenian estimation for the only penalty they carry is a fine.

[3] *Op. cit.*, pp. 104 ff. [4] Aeschin. iii. 23. [5] *Ath. Pol.* xlviii. 4–5.

instance of a private citizen and had been either acquitted or fined.[1] If this be true, a retiring official was subject to a double accounting for his official acts. It must be assumed that there was a clear-cut division between the jurisdiction of the *logistai* and *synegoroi* and that of the *euthynoi*. It is difficult to see how a retiring official could be given a discharge by one court and again before the final release of himself and his property[2] run the risk of condemnation as a former official without violating the principle of *res judicata*. This difficulty has been recognized.[3] But it is not enough to say that the action of the court was "perfunctory" in the case of a man who "had rendered his accounts," involving as it did the possibility of trial by a court for peculation or bribery or maladministration. The trial would be just as thorough as any normal Athenian trial was. It would be strange, indeed, to grant a man a discharge by verdict of the court finding in his favor in a trial prosecuted by the *synegoroi* of the *logistai* or a private prosecutor, and then in effect say to him: "The verdict in these cases is not final as it is in others, and we reserve the right for three days to hale you before another court if any prosecutor appears, whether the charge has already been brought before or not." Assuredly this is not the right explanation. There were two quite different examinations; Wilamowitz calls the first λόγος and the second εὔθυνα.[4] This distinctive terminology is not always used. For example, in the passage quoted above,[5] the first stage is called εὔθυναι. But quite apart from the terminology, the distinction to which Wilamowitz draws attention is valid. When the *logistai* had finished their task, the *euthynoi* for a space of

[1] The unsuccessful defendant who paid his fine had as truly passed his account as the official who had been acquitted or discharged without trial.

[2] For the restrictions put upon ὑπεύθυνοι cf. Aeschin. iii. 21.

[3] Koch, *De Atheniensium logistis euthynis synegoris*, p. 7; cf. also Lipsius, *op. cit.*, pp. 105, 293.

[4] *Op. cit.*, II, 232 ff.

[5] Arist. *Ath. Pol.* xlviii. 4–5. For a full discussion of the terminology cf. Koch, *op. cit.*, pp. 15 ff.

three days received charges against the retiring magistrate.[1] On receiving a written charge the *euthynos* and his assessors examined it (ἀνακρίνειν). If it had to do with accounts and vouchers, or peculation, or bribery, or any instance of maladministration, for which the retiring official had already been acquitted or convicted, they naturally would do nothing about it. If, however, it dealt with some fault of omission or commission outside this range, private cases were turned over to the proper section of the Forty, and public cases to the thesmothetai. Owing to the insistence upon a technical meaning for such words as καταγνῷ and ἀνακρίνας, some misapprehension regarding the functions of the *euthynoi* has arisen.[2] The *euthynoi* and their assessors examined the records of the case in the *logisterion*, and if they determined that the charge did not violate the principle of *res judicata*, they turned it over to the proper official for *anakrisis* and trial.[3]

It is much better to assume that the Athenians in this fashion avoided putting a man twice in jeopardy than to conclude with Lipsius: "Freilich lag darin ein gewisser Abfall von dem Rechtsgrundsatze, dass niemand zweimal wegen derselben Sache zur gerichtlichen Verantwortung gezogen werden dürfe."[4]

An apparent exception to the *res judicata* rule occurs when

[1] The phrase εὔθυναν ἄν τ' ἰδίαν ἄν τε δημοσίαν ἐμβαλέσθαι is a curious one. Koch (*op. cit.*, p. 5, n. 1) points out that εὔθυναι in the plural is used of rendering accounts. The singular has the meaning of "penalty," "damages," and also "the charge," as in Lysias x. 27; xi. 9. Andoc. i. 73, cited by Liddell and Scott (1925), is not a parallel, because it has the plural. In Aristotle it simply means "file a charge, public or private"; cf. Rackham, Kenyon, *ad loc.*

[2] The editors vary between ἀναγνούς, read now by Kenyon and Rackham, and ἀνακρίνας, read by Sandys, Thalheim, and Opperman. ἀνακρίνας is preferable, but it does not refer to the regular *anakrisis*, for there was no *anakrisis* in the ordinary sense. That was conducted by the thesmothetai or the Forty. It seems unnecessary to say that an official read a document filed with him, but undoubtedly the accuser and the accused were interviewed, as ἀνακρίνας suggests.

[3] The word καταγνῷ in Aristotle and κατεγνωσμέναι in Andoc. i. 78, ὅσων εὔθυναί τινές εἰσι κατεγνωσμέναι ἐν τοῖς λογιστηρίοις ὑπὸ τῶν εὐθύνων, do not mean that these officials were real judges of the case. They simply reached a conclusion unfavorable to the official in the sense that he must in their opinion stand trial.

[4] *Op. cit.*, pp. 293 and 953, where is cited the passage from Demosthenes quoted *supra*, p. 256, in which εὔθυναι are mentioned.

a man who had sued for an estate unsuccessfully might renew his claim on another ground. This was done in *Eubulides* v. *Macartatus*.[1] Glaucus and Glaucon claimed the estate of Hagnias under a will which the court decided was false. Later they pushed their claim as relatives along with others and were successful. Such a situation must have been a bit bewildering to the common man, but it was according to law. When the speaker says *οὐκ οἴονται δεῖν οὔτε τοῖς νόμοις τοῖς ὑμετέροις πείθεσθαι οὔτε τοῖς γνωσθεῖσιν ἐν τῷ δικαστηρίῳ*[2] he is merely trying to arouse prejudice in the minds of those dicasts who might be puzzled and annoyed by the situation. For if the matter was actually *res judicata* the procedure was to file a *paragraphé*, but in this case this was not done.

Provision for a new trial on the appearance of new evidence especially in criminal cases is a well-known feature of modern criminal justice, but in Athens little is heard of it. In the case of Sosias already discussed the ecclesia itself discharged the condemned man. The case was not sent to a dicastery for retrial as might have been expected. But the ecclesia as sovereign body in the state could do as it pleased. The only check was a *γραφὴ παρανόμων* against the man responsible for such a measure as that which freed Sosias and others. In the archon's court for the settlement of conflicting claims to an estate (*διαδικασία*) there is a notorious case in which new evidence appeared. Dicaeogenes II died without issue. After his death Proxenus, an uncle of the deceased, produced a will according to the terms of which his own son Dicaeogenes III was adopted as son of the deceased and became heir to one-third of the estate. The rest of the estate was divided among the four sisters of the deceased who were next of kin. This distribution of the estate, though made without litigation, was sanctioned by the archon.[3] Twelve years later Dicaeogenes III produced another will according to which he was adopted as heir to the entire estate. A dicastery approved the will and the sisters lost their shares.[4]

[1] Demos. xliii. 4 ff.

[2] *Ibid.* 6.

[3] Isaeus v. 6: *τῶν δὲ λοιπῶν ἑκάστη τὸ μέρος ἐπεδικάσατο τῶν Μενεξένου θυγατέρων.*

[4] *Ibid.* 7 ff.

In a sense this is not a new trial as a jury did not "probate" the first will, but the estate was legally distributed.

In American courts new trials are constantly granted because of technical objections. Such objections played no part in Athenian courts. However, as it was the practice of litigants in arguing a special plea to deal with the whole case on its merits, a dicastery frequently heard the merits of a case discussed twice. But this does not amount to a new trial or a rehearing as we understand it.[1]

In certain cases a successful suit for perjury against an opponent's witnesses enabled the litigant to reopen the case. Suits for perjury (*δίκαι ψευδομαρτυρίων*) present some interesting problems which have not been satisfactorily solved. It seems desirable to review some of these difficulties at this point to enable the reader to understand the conditions under which the Athenian system regularly permitted a case to be retried.[2]

All suits for perjury must be announced and filed before the votes of the dicasts were counted.[3] As a result of this requirement a successful litigant might sue the witnesses of his opponent. Such a case is mentioned by a client of Lysias.[4] This case presents some unusual features that must have occurred but rarely. Lysistheus had accused Theomnestus of throwing away his shield. Theomnestus was acquitted but he sued Dionysius, one of the witnesses who had testified at the trial that the charge was true. Again he won and the witness was disfranchised. One can easily understand the motive back of the action of Theomnestus even if he was sure that the prosecution had failed when he denounced the witness. Any dereliction in one's military duty was a serious business. Politicians thought it worth while to try to injure

[1] Only in the process of legislation is an insistence upon a fixed meticulous procedure found. If this procedure was not observed the legislation could be attacked by a *γραφὴ παρανόμων*; cf. Gilbert, *op. cit.*, pp. 299–301.

[2] For the sake of convenience we speak of a *δίκη ψευδομαρτυρίων* as a suit for perjury, but the suit included not only false evidence but also illegal evidence; cf. Demos. xlvii. 1–3.

[3] Arist. *Ath. Pol.* lxviii. 4.

[4] x. 22 ff.; cf. Leisi, *op. cit.*, pp. 122 f.

an opponent's reputation by such charges where there was so far as we can see no chance of a conviction. Even an acquittal did not still suspicion.[1] Under these circumstances one can easily see that nothing would help so much to dispel any lingering suspicion as a verdict against one of the witnesses against him. It may very well have been the case that Theomnestus was taking no chance on the outcome of the case and was prepared to lay the basis for a new trial.

The lodging of an ἐπίσκηψις before the dicasts voted must have presented some difficulties to the litigant. Would his denunciation of witnesses show the dicasts that he had little confidence in his case? Or would the denunciation of witnesses injure the litigant who produced them?[2] The law seemed to encourage suits for perjury by inflicting no penalties beyond the loss of the fees in case of failure.[3]

The *timema* in perjury suits has caused some difficulties. Lipsius[4] was so much impressed by the emphasis laid upon deceiving the people in perjury cases that he argued that a false witness could be attacked by a γραφὴ συκοφαντίας. This conjecture has the advantage of accounting for penalties that are normally only associated with a *graphé*. But nowhere in the orators or other legal literature is there the slightest hint that anyone but a prosecutor was ever regarded as a sycophant. The hard-pressed defendant often sought to arouse the sympathy of the dicasts by exclaiming συκοφαντοῦμαι, but he is always referring to the tactics of his opponent and never to his witnesses.[5]

The *timema* is sometimes referred to in language that seems to indicate that *atimia* as well as damages could be inflicted for perjury.[6] The frequent use of ἁλίσκομαι instead of ὀφλισ-

[1] See the taunting words addressed to Theomnestus by the present speaker (x. 9).

[2] Cf. Leisi, *op. cit.*, p. 126; Calhoun, *CP*, XI, 376, n. 7.

[3] Demos. xlvii. 2; cf. Lipsius, *op. cit.*, p. 783.

[4] *Op. cit.*, p. 782.

[5] Cf. Calhoun, *CP*, XI, 372.

[6] Demos. xxix. 16: δίκην ἄν μοι βλάβης ἔλαχεν, εἰ ψευδομαρτυρίων ὑπόδικον αὐτὸν ἐποίουν κατὰ τἀδελφοῦ οὐ προσῆκον, ἐν ᾗ καὶ περὶ χρημάτων καὶ περὶ ἀτιμίας ἄνθρωποι κινδυνεύουσιν. Antiph. ii. δ. 7: οἱ μὲν γὰρ ἀτιμοῦνταί τε καὶ χρήμασι ζημιοῦνται, ἐὰν μὴ τἀληθῆ δοκῶσι μαρτυρῆσαι.

κάνω points to a criminal rather than a civil suit.[1] It is a certainty that a man thrice "convicted" of perjury was disfranchised. It is generally agreed that this penalty was inflicted in accordance with a specific law.

There are two leading cases in which *atimia* is mentioned. Some clients of Isaeus were prosecuting one Leochares for perjury in an ἐπιδικασία. When the votes had been emptied out for counting it became apparent that Leochares had lost his case.[2] An agreement was reached by which Dicaeogenes, in whose behalf Leochares had committed perjury, gave up his claim to the estate. Later in the speech the plaintiffs claimed that it had been possible for them to have disfranchised the defendant: ἐγγενόμενον ἡμῖν αὐτὸν ἐπειδὴ εἵλομεν τῶν ψευδομαρτυρίων ἀτιμῶσαι οὐκ ἐβουλήθημεν.[3] In itself this case presents no real difficulty. The *atimia* anticipated could very easily be the result of the inability of the defendant to pay the damages that might have been imposed. Even the talent asked as damages in *Apollodorus* v. *Stephanus*[4] was a large sum of money quite beyond the means of the ordinary citizen. In the Theomnestus case in Lysias, already mentioned, the reference to *atimia* is not so easily explained,[5] although several explanations are possible. Lipsius[6] believes that in cases where *atimia* is mentioned the speaker has in mind nothing more than disfranchisement resulting from the defendant's inability to pay heavy damages. This *rednerische Übertreibung* is not uncommon in other cases where heavy fines or damages are likely to be incurred.[7] But the difficulty in this case lies in the consideration that no jury would be likely to award heavy damages when the plaintiff had won

[1] Isaeus v. 14: ἐπειδὴ οἱ μάρτυρες ἐάλωσαν. Cf. Andoc. i. 7; Lysias xix. 4; Plato *Laws* xi. 937C; Hyper. ii. 12.

[2] Isaeus v. 17–18; for the difficulties raised by this passage as to the method of counting cf. Wyse, *The Speeches of Isaeus*, p. 423; Lipsius, *op. cit.*, p. 926, n. 98.

[3] Isaeus v. 19.

[4] Demos. xlv. 46.

[5] x. 22: τὸν μαρτυρήσαντα ἠτίμωσεν.

[6] *Op. cit.*, p. 256, n. 54.

[7] Cf. Isoc. xvi. 47: τῶν γὰρ αὐτῶν τιμημάτων ἐπιγεγραμμένων οὐ περὶ τῶν αὐτῶν ἅπασιν ὁ κίνδυνός ἐστιν, ἀλλὰ τοῖς μὲν χρήματα κεκτημένοις περὶ ζημίας, τοῖς δ' ἀπόρως ὥσπερ ἐγὼ διακειμένοις περὶ ἀτιμίας.

his case and suffered no damage. It would be a case rather for the imposition of merely nominal damages. Böckh[1] long ago suggested that *atimia* could be imposed by the dicasts as an additional penalty, *προστίμημα*. This view has found considerable favor,[2] but there are objections to it. Lipsius points out that so far as we know *atimia* was always imposed by law and not by the verdict of the dicasts. Coming back to the Lysias case,[3] we find that had Theomnestus been convicted of throwing away his shield on the evidence of the witness Dionysius, he would have suffered *atimia*.[4] This situation at once suggests that a witness whose false evidence exposed a citizen to *atimia* himself suffered *atimia* upon conviction. It may have been part of the same law that imposed *atimia* for the third offense.[5] It is true that both Andocides and Hyperides speak of *atimia* only for the third offense, but this need not invalidate the suggestion.

A successful perjury suit, whether the damages were nominal or substantial, was a necessary step toward a suit for subornation of perjury (*δίκη κακοτεχνιῶν*) against the litigant who produced false testimony.[6] Beyond these general statements nothing is known about the suit. It may be surmised that as in a *δίκη ψευδομαρτυρίων* the main case would be again argued before the jury, but in neither instance is there a real retrial of the case.

[1] *Kleine Schriften*, IV, 123.

[2] Wyse, *op. cit.*, p. 426; Leisi, *op. cit.*, p. 132; Hermann-Thalheim, *Lehrbuch der Griechischen Rechtsaltertümer*[4], p. 136, n. 3.

[3] x; cf. *supra*, pp. 261 f.

[4] Cf. Andoc. i. 74.

[5] There is no doubt that *atimia* was the immediate result of the conviction, as is shown by Lysias x. 24–25 (trans. Lamb): "Remember that there you have presented him with a rich and goodly gift [his success in securing the condemnation and disfranchisement of Dionysius, the other witness in the previous trial]: in that respect, who would not pity Dionysius for the disaster that overtook him, after he had proved himself a man of the highest valour in times of danger, who on leaving the court remarked that that was our most calamitous campaign, in which many of us were killed, and those who saved their arms had been condemned for false witness at the suit of those who threw theirs away; and that it had been better for him to be killed on that day than return home to meet with such a fate?" (i.e. *atimia*).

[6] Demos. xlvii. 1; xlix. 56.

The immediate effect of a successful perjury suit upon the main case was not the same in all instances. Where a claim to an estate (ἐπιδικασία) was met by a *diamartyria* a conviction for perjury merely left the way open to press the claim in court.[1] The defeated party could still press his claims in a *diadikasia*.[2] A will was invalidated by convicting the witnesses of perjury.[3]

In cases involving the disposition of estates (κλήρων) in Athens there is evidence that convictions for perjury invalidated judgments and opened the way for new trials.[4] It is perhaps a matter of chance that there is no instance of a δίκη κακοτεχνιῶν in the extant forensic literature. In one case in Isaeus when one witness to a will had been convicted the holder under the will to which the witnesses testified compromised and agreed to yield up a portion of the estate involved.[5] In another case in Isaeus[6] a litigant says: "The law ordains that, if there is any conviction for perjury, the action claiming an estate must be heard over again." Plato[7] would allow a δίκη ἀνάδικος if more than half the witnesses were convicted of perjury. The scholiast on this passage says: οὐκ ἐπὶ πάντων δὲ τῶν ἀγώνων ἐγίγνοντο ἀνάδικοι αἱ κρίσεις, ἀλλ' ὥς φησι Θεόφραστος ἐν ζ' Νόμων, ἐπὶ μόνης ξενίας καὶ ψευδομαρτυρίων καὶ κλήρων. It is generally believed that this list is not complete. The scholiast merely selects serious cases in which the defendant had lost his liberty, his citizen rights, or an estate carrying valuable family rights for which no damages in a δίκη ψευδομαρτυρίων or a δίκη κακοτεχνιῶν would be adequate compensation. It has been conjectured that where life or liberty or citizenship rights or family property rights were involved a new trial was allowed as a result of a successful action for perjury.[8] There is no proof for this extremely plausible theory, for, as has been pointed out, the evidence for a

[1] Cf. Wyse in Whibley, *Companion to Greek Studies*, p. 397; Isaeus v. 17.

[2] Cf. Isaeus vi. 52; Leisi, *op. cit.*, p. 32; Lipsius, *op. cit.*, p. 856, n. 38.

[3] Isaeus v. 12 ff.

[4] *Ibid.*, 12–14; xi. 45–46.

[5] v. 12–14, 17–18.

[6] xi. 45–46.

[7] *Laws* xi. 937C–D.

[8] Leisi, *op. cit.*, p. 133; Lipsius, *op. cit.*, pp. 955 ff.

δίκη ἀνάδικος in the orators is limited to the disposition of estates. In support of this theory it has been pointed out[1] that upon the denunciation (ἐπίσκηψις) of a witness or witnesses in serious cases the penalty was not exacted until the perjury suit had been settled. But where the penalty consisted in damages it was enforced without waiting for the outcome of the perjury suit. The suspension of severe penalties points clearly to a possible remedy if the suit for perjury was successful. It is to be understood that the *atimia* in question must have been incurred by a legal enactment and was not merely the result of inability to pay a money penalty. A representative list of cases in which the penalty was complete *atimia* is given by Andocides (i. 74). In the following sections he gives examples of partial *atimia:* ἄλλοι αὖ κατὰ προστάξεις, οἵτινες οὐ παντάπασιν ἄτιμοι ἦσαν. It is not easy to see why the arguments, such as they are, for allowing a new trial in cases of complete *atimia* would not also apply to partial *atimia*.[2]

There are but slight indications in the sources regarding the number of witnesses to be convicted before a new trial could be granted. Plato[3] would require that more than one-half of the witnesses should be convicted of perjury before there could be a new trial. Moreover, there should be ἀμφισβήτησις and διαδικασία to determine how far the perjured testimony influenced the verdict of the jury.

Turning to the orators, we find the prosecution of witnesses often a matter of strategy to procure better terms from the winner of the suit.[4] As he was faced with a δίκη κακοτεχνιῶν

[1] Leisi, *op. cit.*, pp. 126 f.

[2] Lipsius (*op. cit.*, p. 957) conjectures that false testimony could be attacked in public cases by the original prosecutor or anyone else and a new trial allowed where a criminal escaped punishment by means of perjured testimony. Some support for this view is found in the fact that if the defendant in a γραφὴ ξενίας secured his acquittal by bribery, he could be attacked by an indictment for bribery (γραφὴ δωροξενίας (Arist. *Ath. Pol.* lix. 3). A successful prosecution for bribery would undoubtedly invalidate the verdict of the bribed dicasts.

[3] *Laws* xi. 937C–D; for the moment we defer the discussion of the applicability of Plato's suggestion to the Athenian system.

[4] Demos. xlvii. 49.

it was in his interest to protect his witnesses from prosecution. So the loser was sometimes able to obtain terms by dropping further prosecution of witnesses already denounced.[1]

On the basis of a statement in Isaeus[2] it has been argued that a judgment was nullified by the conviction of a single witness.[3] The passage is as follows: *κελεύει δ' ὁ νόμος, ἐὰν ἁλῷ τις τῶν ψευδομαρτυρίων, πάλιν ἐξ ἀρχῆς εἶναι περὶ αὐτῶν τὰς λήξεις.* Lipsius objects that the law "ist zu wenig präzis gefasst, um einen sicheren Schluss zu rechtfertigen"[4] and refers to perjury prosecutions in another case in Isaeus.[5] The case in outline is as follows.[6] When Dicaeogenes III produced a second will granting him all the estate of Dicaeogenes II, Polyaratus, husband of the eldest sister of Dicaeogenes II, made an *ἐπίσκηψις* but died *πρὶν ἐπεξελθεῖν οἷς ἐπεσκήψατο τῶν μαρτύρων.* Later Menexenus II, son of a sister of Dicaeogenes II, brought a successful action for perjury against Lycon, who had been one of the witnesses to the genuineness of the second will (*ἐπεξῄει τοῖς καταμαρτυρήσασιν ἡμῶν καὶ ἐκείνου τὰ ψευδῆ*). Dicaeogenes III became alarmed and made a bargain with Menexenus to accept his share of the estate, abandon the other relatives, and *τοὺς δὲ μήπω ἑαλωκότας τῶν μαρτύρων ἀφεῖναι.* But Dicaeogenes III failed to carry out his part of the bargain and all the heirs joined in an attack on him *ἐπειδὴ οἱ μάρτυρες ἑάλωσαν.* The plural *μάρτυρες* is used here and in the following section, although the conviction of only one witness, Lycon, is mentioned. If the statement is correct, Menexenus II must have proceeded with the prosecution of the rest of the witnesses when he found the bargain was broken.[7] But whether all the witnesses were prosecuted or not makes little difference, for it was clearly the intention

[1] Isaeus v. 12–13.

[2] xi. 46.

[3] Gide and Caillemer, in Darem.-Saglio, *s.v. ἀναδικία*; Leisi, *op. cit.*, p. 134.

[4] *Op. cit.*, p. 958.

[5] v. 9, 12 ff.

[6] For a fuller statement cf. *supra*, p. 260.

[7] Wyse (*op. cit.*, p. 421) seems to doubt the correctness of the plural, but Lipsius (*op. cit.*, p. 958, n. 12) accepts it.

of both Polyaratus and Menexenus to prosecute more than one witness.[1] But it will be readily granted that it is not the number but the importance of the witness who gave false testimony that counted in persuading the jury. Plato, as we have seen,[2] wished to have the effect of the denounced testimony determined. Lipsius accepts Plato's suggestion regarding an inquiry into the effect of the denounced evidence upon the verdict of the court:

> Wohl aber liesse sich denken, dass der Gerichtsvorstand, der für Haupt- und Zeugnisklage der gleiche war, darüber zu befinden oder eine Entscheidung der für letztere bestellten Richter herbeizuführen hatte, inwieweit das bei dieser beigebrachte Beweismaterial eine Wiederaufnahme der Hauptsache rechtfertige.[3]

It is wholly contrary to the spirit of the Athenian judicial system to delegate to any official real judicial powers such as Lipsius contemplates. The alternative suggestion that the dicasts who condemned the witnesses should determine whether the testimony did in fact influence the verdict in the main issue would require two trials: the first to determine whether the evidence denounced was in fact false and the second to determine whether the false evidence was of such character as to warrant a new trial. The only parallel to this double trial is in the criminal cases where the dicasts after finding a defendant guilty proceeded to determine the degree of punishment. But this parallel is too remote. The difficulty requires no such heroic treatment as the alternatives suggested by Lipsius. It is much better to accept the law cited by Isaeus[4] and conclude that the conviction of even one witness was sufficient to warrant a new trial. It would be quite possible to find matters proved by witnesses in the extant speeches that were so unimportant that they might easily have been omitted. But we must remember that the litigant had to think not only of convicting a witness of perjury but of winning his case when he was granted a new trial. He could not afford to reopen the case with the conviction of a

[1] Isaeus v. 9, 12 ff. [2] *Supra*, p. 266. [3] *Op. cit.*, p. 960.

[4] xi. 45, quoted *supra*, p. 265. Cf. Calhoun, *TAPA*, LXV (1934), 86.

wholly unimportant witness. Here is where the common sense of an amateur system triumphs over our modern technicalities. It was, however, sound sense for a litigant to go to trial with as many convictions for perjury as he could compass, even if the law required only one.[1]

When a litigant lost a case by default he could, for good and sufficient reasons, have the case reopened within two months of the delivery of judgment. A claim that his absence from court was unavoidable and justifiable must be supported by an oath. If the other party contested the claim, a court would have to decide. If the defendant could not establish his claim, judgment given in default could be executed forthwith. Otherwise the plaintiff had the right to renew the suit. If the defendant claimed that his failure to appear was due to the fact that he had not been properly summoned, he had to bring a successful suit for false summons against the individual who had made oath that he had duly summoned the defendant. The *γραφὴ ψευδοκλητείας* was *τίμητος*. A third conviction entailed *atimia*. Lipsius[2] gives the reader a wrong impression when he says that the death penalty could be inflicted. The case he cites was very unusual. In *Apollodorus* v. *Nicostratus*[3] the plaintiff tells how he had on a former occasion prosecuted Arethusius, the brother of Nicostratus, for *ψευδοκλητεία*. According to the story of Apollodorus, after the indictment had been filed and the *anakrisis* had been completed, Arethusius had destroyed his flower gardens and had made an aggravated assault upon himself one night on the way between the city and the Piraeus. After the conviction of the defendant the dicasts, evidently incensed by the story of the murderous assault, tried to induce Apollodorus to change his *timema* to the death penalty, but in the end accepted the penalty of a talent offered by the defendant. The passage is as follows: *καὶ ἐν τῇ τιμήσει βουλομένων τῶν δικαστῶν θανάτου τιμῆσαι αὐτῷ, ἐδεήθην μὲν ἐγὼ τῶν δικαστῶν μηδὲν δι' ἐμοῦ τοιοῦτον πρᾶξαι, ἀλλὰ συγχωρῆσαι ὅσου περ αὐτοὶ*

[1] Cf. Leisi, *op. cit.*, pp. 134–35.

[2] *Op. cit.*, p. 447.

[3] Demos. liii. 17–18, 26.

ἐτιμῶντο, ταλάντου.[1] There is no indication here that Apollodorus had ever asked for the death penalty. If the jury had condemned the defendant to death it would have been only because pressure was put by the dicasts upon Apollodorus to change his *timema* to one of death. But when he says he refused to ask for the death penalty because he did not wish that it could be said that he, a naturalized citizen, was the cause of the death of a native Athenian, it seems clear that he had not demanded the death penalty. He had already entered the *timema* before the aggravated assault and destruction of property which alone could have justified such a severe penalty. Consequently, it is misleading to say that a simple case of γραφὴ ψευδοκλητείας might carry the death penalty. The actual penalty in the only extant case was one talent.

The incident shows, in spite of obvious exaggeration, that individual dicasts might in considerable numbers protest against the proposed penalties of the prosecutor and the defendant and ask for something different. But such participation by the dicasts does not amount to an official participation in an increase or decrease in the penalty proposed by the prosecution.

[1] Demos. liii. 18; cf. *infra*, p. 274.

CHAPTER X

EXECUTION OF JUDGMENTS

When the verdict of a court required a defeated litigant to pay anything to the plaintiff in the way of damages or debt, it was the business of the successful litigant to execute the judgment.[1] In the case of a successful *apographé* also it was the business of the prosecutor to recover the property. This provision was no doubt due to the fact that the prosecutor received three-fourths of the property recovered.[2] Otherwise confiscations were the business of public officials.

If the subject of a suit was the ownership of a particular piece of property, personal or real, the loser was granted a fixed period of time within which to make restoration. If he failed to do so, he became ὑπερήμερος and the winner might seize personal property or make formal entry upon real estate (ἐμβάτευσις). If the formal entry was not recognized, the litigant could bring an action of ejectment or ouster (δίκη ἐξούλης). Thus a successful suit was not infrequently the cause of more litigation. The experience of Demosthenes with his guardians is a good example. First Demosthenes obtained a verdict against one of them, Aphobus, for ten talents.[3] Aphobus tried unsuccessfully to convict Phanus, one of Demosthenes' witnesses, of perjury.[4] If the prosecution had been successful, it could have been used by Aphobus and the other guardians to effect a favorable settlement; or if Demosthenes sued the other guardians, the verdict against the witness would have been a formidable weapon for the defense. The next step was Demosthenes' entry upon a piece of real estate. Onetor, the brother-in-law of Aphobus, claimed that the property was pledged to him as security for

[1] For the possible participation of the demarch cf. *supra*, I, 322.

[2] Cf. Lipsius, *Das Attische Recht*, pp. 299 ff., 944.

[3] xxvii–xxviii. [4] xxix.

the dower of his sister, the divorced wife of Aphobus. The final step was an action of ejectment against Onetor to test his claim.[1]

Assaults not infrequently resulted from attempts to execute judicial judgments. Naturally, a defeated defendant was more likely to resist the plaintiff whom he regarded as his personal enemy than an officer of the court backed by the law. Consequently, they sometimes came to blows, and resultant actions for assault and battery were frequent. Two excellent examples of such cases occur in a Demosthenic speech. The speaker was charged by the state with recovering some ship's gear from one Theophemus. Being authorized by law to make a seizure, he did so and came to blows with Theophemus. The speaker later filed a suit for assault and battery.[2] Theophemus responded with a cross-action of the same nature. The latter came to trial first, and the verdict of the court was in favor of Theophemus, who in due time proceeded to collect the damages awarded. If the story of the speaker[3] is to be believed, the men making this seizure for Theophemus invaded the quarters of the women and killed an old freedwoman who had tried to resist them. This was of course a most unusual case in so far as the homicide was concerned.[4]

Banishment was a severe punishment in the ancient world. A man expelled from the social and political group to which he belonged found great difficulty in establishing himself.[5] A court might in some cases sentence a defendant to *atimia*, full or partial loss of civil rights. For example, partial *atimia* was the penalty for failure on the part of a prosecutor to

[1] xxx–xxxi.

[2] xlvii. 45; cf. 39 *et supra*.

[3] *Ibid.* 52 ff.

[4] Cf. *supra*, pp. 217 ff.

[5] The nearest approach to banishment in the modern world is the deportation of undesirable aliens. This form of punishment for criminal aliens is not uncommon in the United States. Banishment for life or a term of years was practiced at Athens in homicide cases (cf. *supra*, I, 118 ff.). A man who evaded trial for a serious offense was normally condemned to death *in absentia*. He might, like Alcibiades, be pardoned eventually, but in the meantime he lived in exile. An exile who returned without due permission before the allotted time elapsed was liable to the death penalty.

obtain at least one-fifth of the votes in a criminal case or to carry through a prosecution once begun. He was forbidden by law to engage in similar prosecutions in the future. It is not known how such punishments were enforced. Magistrates and judicial boards intrusted with criminal prosecutions might be furnished with a list of such penalized prosecutors, in which case it would be an easy matter to refuse their indictments. In any event, if such a prosecutor's indictment was accepted, we may be sure that the defendant or his friends would become aware of his predicament and insist that the indictment be quashed. Naturally, it would help the alleged criminal only for the moment as there were plenty of qualified prosecutors to conclude the prosecution if the evidence warranted it.[1]

In cases of *atimia* either imposed by the courts or arising from failure to pay a fine, the enforcement of the penalty frequently gave rise to further litigation in the form of *endeixis* against a man exercising forbidden rights. Andocides selects some for special mention to show how varied they were. The list includes deprivation of the right to be a councilor, to bring a public suit, to speak in the assembly, to enter the market place, to sail to the Hellespont or to Ionia. The number of persons laboring under these and other disabilities was considerable, as may be inferred from the practice of pardoning them in times of great national danger.[2] Athens possessed no police force to enforce these restrictions. Indeed, no conceivable force in the fifth century B.C., except possibly the Spartan secret police (*κρυπτεία*), could have been effective. The volunteer prosecutor in the guise of an informer animated by personal or political hostility was under the circumstances the most efficient instrument available.

Pains and penalties were either fixed by law (*ἀτίμητοι*) or determined by the court (*τιμητοί*). It is indicative of the popular character of Athenian criminal justice that a choice of penalties was given the jury in the majority of cases. The

[1] Cf. Antiph. vi. 36 f. for an attempt to disqualify by a charge of homicide a particularly dangerous prosecutor.

[2] Andoc. i. 73 ff.

trial of Socrates furnishes a good example of what could happen in an Athenian trial. The prosecutor and the defendant each proposed a penalty, between which the dicasts must choose. There was no further alternative. But the convicted defendant might change his recommended penalty, as did Socrates upon the advice of friends.[1] The prosecutor also could change the penalty originally set down.

> When it came to the question of punishment, the jurors were inclined to pass sentence of death upon him; I begged them, however, not to do anything of the sort at my instance, but to consent to the fine which they themselves proposed, a talent—not that I had any desire to spare Arethusius, (for he well deserved death for what he had done to me,) but that it might not be said, that I, the son of Pasion, who had been created citizen by a decree of the people, had caused the death of an Athenian.[2]

The jurors here tried to put pressure on Apollodorus to change his original *timema*. They themselves could not change it.[3]

Corporal punishments were exacted by the state. The first Athenian code was found to be too severe. Solon was undoubtedly expressing current public opinion especially of the lower classes when he

> repealed the laws of Draco, all except those concerning homicide, because they were too severe and their penalties too heavy. For one penalty was assigned to almost all transgressions, namely death, so that even those convicted of idleness were put to death, and those who stole salad or fruit received the same punishment as those who committed sacrilege or murder. . . . . And Draco himself, they say, being asked why he made death the penalty for most offenses, replied that in his opinion the lesser ones deserved it, and for the greater ones no heavier penalty could be found.[4]

Later ages approved the abolition of the Draconian severity as is shown by the epigram of Demades, a contemporary of Demosthenes much given to phrase-making: "Draco's laws were written not with ink, but with blood."[5] The impression made by Demades' epigram is shown by its application to the indictments of that stern and righteous prosecutor Lycurgus,

[1] Plato *Apol.* 38B.

[2] Demos. liii. 18.

[3] Cf. Lipsius, *op. cit.*, pp. 253 f.

[4] Plut. *Solon.* xvii.

[5] *Ibid.*

who was said to have written his indictments "not in ink but in death."[1]

Imprisonment at Athens was both precautionary and penal. It is an accepted fact that persons accused of flagrant crimes were incarcerated until their trial and criminals condemned to death were imprisoned until execution.[2] But the use of imprisonment as a penalty for crime among the Athenians has been generally denied by scholars.[3] Barkan, however, strongly affirms that imprisonment was used as a penalty in itself.[4] It was clearly an additional penalty inflicted upon a thief,[5] and persons sentenced to a fine could be incarcerated until the fine was paid.[6] A state debtor who failed to pay his debt by the appointed time could be imprisoned. If he persevered in his refusal to pay, he could be kept in prison indefinitely, even for life; this imprisonment would, in fact, constitute his punishment. It is logical to suppose, therefore, that imprisonment was regarded as an alternative penalty.[7]

Demosthenes speaks of imprisonment as a corporal penalty: "In the first place, men of the jury, it would not have been lawful for you to determine what penalties corporal or pecuniary a man should suffer [ὅ τι χρὴ παθεῖν ἢ ἀποτεῖσαι], for in the expression 'corporal penalty' is included imprisonment [ἐν γὰρ τῷ παθεῖν καὶ ὁ δεσμὸς ἔνι]."[8] In the same speech he says: "People have been imprisoned ere now both for debts and upon judgments [καίτοι καὶ ἐπὶ χρήμασιν ἤδη τινὲς

[1] Ps.-Plut. *Vita Lycurgi* 10.

[2] Antiph. v. 69; Xen. *Hell.* i. 7; Plut. *Phocion* xxxvi.

[3] Schoemann, *Gr. Alterth.*, I, 533; Thonissen, *Le droit pénal de la république athénienne*, p. 114; Thalheim, in Pauly-Wissowa, *s.v.* δεσμωτήριον; Gilbert, *Const. Antiq.*, p. 414.

[4] *CP*, XXXI, 338 ff.

[5] Demos. xxiv. 105; cf. Barkan for the argument that ἐν ποδοκάκκῃ δεδέσθαι and ἐν ξύλῳ δεδέσθαι are the same and refer not to exposure in public in an uncomfortable position but to harsher punishment within the prison walls.

[6] Demos. xxi. 47; cf. xxv. 46; xxxiii. 1; liii. 11; lvi. 4.

[7] There are many references to the unpleasantness of long imprisonments (*ibid.* xxiv. 125, 135; xxv. 61; Dinarchus ii. 2).

[8] xxiv. 146.

ἐδέθησαν καὶ ἐπὶ κρίσεσιν]."[1] The author of the speech *Against Alcibiades*, attributed to Andocides, lists imprisonment in the category of penalties such as exile and death.[2] And again in Demosthenes the speaker says: "For the courts of justice decide all questions that are brought to trial and they are empowered to pass sentence of imprisonment or any other sentence that they please."[3] When Socrates was asked to propose a counterpenalty he says: "What penalty shall I propose? Imprisonment? And why should I live in prison [καὶ τί με δεῖ ζῆν ἐν δεσμωτηρίῳ], a slave to those who may be in authority?"[4] Here Socrates is clearly referring to life-imprisonment, and he goes on to say that a money fine would be the same thing (ταὐτόν) for, having no money, he would have to remain in prison.[5] And Lysias remarks: "For Andocides . . . . committed himself to prison having assessed the penalty at imprisonent if he failed to hand over his attendant."[6] All of these passages, together with the frequent use of the word τιμησάμενος, seem to furnish conclusive evidence that imprisonment was a normal penalty in Athens. When the evidence is weighed, concludes Barkan,[7] it seems indisputable that imprisonment was a penalty per se in Athens and was probably used even more frequently than the sources indicate.

The death penalty was obligatory in the case of murder,[8] high treason, temple robbery, κακουργήματα which included κλέπται, λωποδύται, ἀνδραποδισταί, τοιχωρύχοι, and βαλαντιοτόμοι,[9] and certain offenses in connection with the grain supply.[10]

[1] *Ibid.* 132; cf. 92; li. 4.

[2] Andoc. iv. 3 f. The fact that the speech is spurious does not detract seriously from its authority in a statement of this nature; cf. Jebb, *Attic Orators*, pp. 131 f.; Blass, *Attische Beredsamkeit*, pp. 332 ff.

[3] xxiv. 151.

[4] Plato *Apol.* 37C.

[5] Cf. Schanz *ad loc.*

[6] vi. 21.

[7] *Op. cit.*, p. 341.

[8] Cf. Lipsius, *op. cit.*, p. 603.

[9] Cf. *ibid.*, p. 78; *supra*, pp. 214 f. In the case of κακουργήματα the death penalty was obligatory only if the criminal confessed (Arist. *Ath. Pol.* lii. 1).

[10] Demos. xxxiv. 37; xxxv. 50; Lycurg. i. 27. It seems clear that death was the penalty by law for treason, though the dicasts may have had to determine sometimes

Stoning was a natural form of community vengeance upon a public wrongdoer who had openly injured the community.[1] It was originally a form of community self-help in which even the unarmed men and the women could participate. There are references to stoning in the Heroic period;[2] they are all examples of community self-help. Some appearance of judicial action was taken in Argos before stoning for a military offense. In Thucydides' account of the attempted stoning of Thrasyllus, the Argive general, there is a hint that military offenders were tried and stoned if found guilty.[3] Euripides[4] represents the city of Argos as voting in assembly whether or not Orestes and his sister should be stoned to death (*εἰ χρὴ θανεῖν νὼ λευσίμῳ πετρώματι*). There is no indication that stoning was ever a legal punishment in Athens. The instances of community stoning mentioned can only be classified as lynching.[5]

It is interesting to note that Plato in the *Laws* harks back to early Greece and introduces stoning in a curious form in his ideal state where slayers of mothers, fathers, children, and brothers are concerned:

> If any man be convicted of such a murder, and of having slain any of the persons named, the officers of the judges and magistrates shall kill him and cast him out naked at an appointed cross-roads outside the city; and all the magistrates, acting on behalf of the whole State, shall take each a stone and cast it on the head of the corpse.[6]

It is the community character of the punishment that appealed to Plato, as may be seen in the provision that each

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just what constituted treason (Thuc. i. 138. 6; Xen. *Hell.* i. 7. 20–22; Demos. xviii. 38; xx. 79).

[1] Hirzel ("Die Strafe der Steinigung," *Abhandlung d. Königl. Sächs. Gesellsch. d. Wissensch.*, LVII, 225 ff.) has collected and studied all the instances of stoning in the ancient world. Barkan (*Capital Punishment in Ancient Athens*, pp. 41 ff.) has confined himself to the Greek instances of stoning.

[2] Cf. *supra*, I, 26, 206.

[3] Thuc. v. 60; cf. Hirzel, *op. cit.*, p. 238.

[4] *Orestes* 46 ff.

[5] Plut. *Solon* xii; schol. on Aristoph. *Knights* 447. For the confusion of names in Herod. ix. 5 and Demos. xviii. 204 cf. Barkan. *op. cit.*, p. 45, n. 2; cf. the proposed stoning of Dicaeopolis in the *Acharnians* 295.

[6] 873B (trans. Bury).

magistrate shall cast a stone in behalf of the citizens to free the community from pollution. There is no indication that the culprit was executed by stoning.

Three different methods of inflicting the death penalty in Athens are mentioned in the sources. They are precipitation into the *barathron* or a convenient rocky chasm,[1] *apotympanismos* (ἀποτυμπανισμός), and poisoning by hemlock (κώνειον). In the following pages the order in which these punishments were introduced and the nature of *apotympanismos* will be discussed.[2]

Execution by precipitation from a high rock or tower into a chasm was a primitive and widespread practice which can be authenticated for several places. Pausanias[3] says that there was a law in Elis to the effect that any woman found at the Olympic games was to be cast from Mount Typaeum. Similarly, criminals were thrown from a high rock in Delphi,[4] in Sparta,[5] and in Thessaly.[6] Though there is no recorded case of legal execution in Athens at any time by casting condemned criminals into the *barathron*, it is very likely that it was so used. The killing of the envoys of Darius by hurling them into the *barathron* suggests at once that the Athenians treated them as they did their own condemned criminals.[7]

The lack of any definite statement regarding the *barathron* has led some scholars to believe that the *barathron* was not used as a place of execution but as a receptacle for the bodies of criminals otherwise executed.[8] There are three passages

[1] This method of execution has been denied by some authorities.

[2] The question of the disposal of the bodies of executed criminals (cf. Hager *Jour. of Phil.*, VIII, 1 ff.), the prohibition of burial in Attica, and the location of the *barathron* and the *orygma* are beyond the scope of this discussion.

[3] v. 6. 7.

[4] Aeschin. ii. 142; cf. Plut. *Moral.* 557A, who tells of the execution of Aesop at Delphi.

[5] Paus. iv. 18. 4.

[6] Zenob. 87: *ἐν Θεσσαλίᾳ τόπος ἐστὶ Κόρακες, ὅπου τοὺς κακούργους ἐνέβαλλον.*

[7] Herod. vii. 133.

[8] Cf. Barkan, *op. cit.*, p. 60, for the literature and a discussion of the problem. Cf. Gernet, *REG*, XXXVII, 268 ff., for a complete refutation of the view that the *barathron* was never used as a place of execution.

involved in the problem. Miltiades was brought to trial on a capital charge of deceiving the people; Xanthippus was the prosecutor.[1] In referring to this trial Plato says: *Μιλτιάδην δὲ τὸν Μαραθῶνι εἰς τὸ βάραθρον ἐμβαλεῖν ἐψηφίσαντο.*[2] On the face of it, the statement seems to mean that Miltiades, if convicted, was to be executed by being cast into the *barathron*. If it merely means that his body was to be disposed of by being thrown into the *barathron*, why was a vote necessary to authorize it?[3] Moreover, the following words, *καὶ εἰ μὴ διὰ τὸν πρύτανιν, ἐνέπεσεν ἄν*, clearly indicate that the *prytaneis* saved him from death, for he was fined, not executed. Xenophon, in speaking of the so-called decree of Cannonus, uses the words *ἀποθανεῖν εἰς τὸ βάραθρον ἐμβληθέντα.*[4] Here there is no doubt of the meaning of the Greek.[5]

All indications point to the *barathron* as the earliest form of legal execution in Athens. An ancient scholiast and a number of the lexicographers[6] describe the *barathron* as a rocky chasm fitted with spikes and hooks. It would seem that they were designed to tear and lacerate the body so as to insure death.

The next method of inflicting capital punishment to be discussed is known as *ἀποτυμπανισμός*. Until recently it has been interpreted as "beating to death with a club."[7] In a book published in 1923, however, Keramopoullos presents an entirely different view, based upon excavations in Phalerum. In one grave were found seventeen skeletons with iron collars

[1] Herod. vi. 136, quoted *supra*, I, 207.

[2] *Gorgias* 516E.

[3] Cf. Gernet, *op. cit.*, p. 271.

[4] *Hell.* i. 7. 20, quoted *supra*, I, 205.

[5] The MS reading is *ἀποθανόντα εἰς τὸ βάραθρον ἐμβληθῆναι.* However, the scholiast on Aristoph. *Eccl.* 1081 quotes Xenophon as reading *ἀποθανεῖν εἰς τὸ βάραθρον ἐμβληθέντα*, which is adopted by both the Oxford and the Teubner texts. Those who believe that the *barathron* was not a place of execution accept the MS reading and regard the *Gorgias* passage as inconclusive.

[6] Schol. on Aristoph. *Plutus* 431; Suidas, Photius, *s.v. μητραγύρτης*; Pollux viii. 71; Harpocration, *s.v. βάραθρον.*

[7] Cf. Lipsius, *op. cit.*, p. 77, n. 101; Caillemer, in Darem.-Saglio, *s.v.;* Thalheim, in Pauly-Wissowa, *s.v.* Hermann-Thalheim (*Gr. Rechtsalt.*, p. 141, n. 5) adopt the view of Pollux viii. 71 that *τύμπανον* or *τύπανον* was the "machine" upon which the condemned criminal was bound for execution.

around their necks and cramp irons to which bits of wood still adhered about their ankles and wrists. Keramopoullos believes that they were executed criminals.[1] There are several possible methods of execution with these implements. The new Liddell and Scott *Lexicon* translates ἀποτυμπανισμὸς as "crucifixion." According to Herodotus,[2] the Athenians crucified a Persian enemy who had by impious deeds polluted a temple. The words ζῶντα πρὸς σανίδα διεπασσάλευσαν[3] mean "crucify" in the oriental manner by driving spikes through the hands and feet. For this meaning of διαπασσαλεύω is quite clear in a passage in Aristophanes[4] where the word is used of a skin pegged out on the ground. But there is no evidence that the Athenians ever crucified their own criminals in this manner.

Keramopoullos, however, from archaeological evidence reconstructs an execution of the following fashion.[5] The criminal was stripped and fastened to a wide, upright plank by means of five iron bands encircling his ankles, wrists, and neck. From the condition of the skeletons it would seem that the neck-band was the tightest and supported most of the weight of the body. Thus the criminal hung for many days, exposed to heat and cold, hunger and thirst, birds and insects, until he finally expired, his agony having been prolonged inhumanly because no blood was let as in a Roman crucifixion. Keramopoullos remarks that this form of punishment was altogether unworthy of the Athenian civilization, and he explains its existence by saying that it was not a product of the great period of fifth-century Athens but of ancient times.

[1] Ὁ Ἀποτυμπανισμός (Βιβλιοθήκη τῆς ἐν Ἀθήναις Ἀρχαιολογικῆς Ἑταιρείας, No. 22). Gernet (*op. cit.*, pp. 261 ff.) completely accepts the conclusions of Keramopoullos regarding *apotympanismos*. Keramopoullos' findings, however, are vigorously attacked on archaeological grounds by Arvanitopoulos, Μέθοδος πρὸς ἔρευναν τοῦ Ἀττικοῦ ποινικοῦ δικαίου (Volo, 1923).

[2] vii. 33.

[3] Cf. ix. 120: σανίδι προσπασσαλεύσαντες ἀνεκρέμασαν.

[4] *Knights* 369–71:

ἡ βύρσα σου θρανεύσεται.
δερῶ σε θύλακον κλοπῆς.
διαπατταλευθήσει χαμαί.

[5] *Op. cit.*, pp. 108 ff.

This harsh and inhuman law was a part of an ancient legislation which, for general traditional reasons in later times, the Athenians preserved with reverence and firmness as a shield of their democratic organization. It seems preferable, however, to regard death as brought about by strangulation rather than by a bloodless crucifixion.

There is in Aristophanes[1] an excellent burlesque of *apotympanismos*. Mnesilochus, on being discovered among the female celebrants of the Thesmophoria, is fastened by order of the *prytanis* to some kind of upright wooden contrivance called σάνις or τύμπανον.[2] The one who fastened him up is ordered to mount guard and allow no one to approach. Mnesilochus asks the guard to loosen the nail and then complains that instead of loosening he has tightened it.[3] Later Mnesilochus complains that he is dying with throat-cutting agonies.[4] On the basis of these words we might conclude that the criminal condemned to death by *apotympanismos* was strangled by tightening with a ἧλος a collar such as Keramopoullos discovered. A similar modern method of execution is the Spanish garotte.[5]

It is worth while to re-examine the literary sources to see whether there is any evidence to show how soon death occurred. Plutarch[6] reports a story by Duris, the Samian, to the effect that when Pericles reduced Samos in 439 B.C. he had the Samian officers and marines fastened to planks (σανίσι προσδήσας) and exposed to the public. At the end of ten days their skulls were crushed. It is clear that this was not a case of *apotympanismos*. The word προσδήσας suggests rather a

[1] *Thesmoph.* 930 ff.; cf. Gernet, *op. cit.*, p. 264, n. 1.

[2] Cf. *Thesmoph.* 1123 f. and the use of κρεμάζω in 1026, 1053, 1110.

[3] 1003 f.: χάλασον τὸν ἧλον. . . . . οἴμοι κακοδαίμων, μᾶλλον ἐπικρούεις σύ γε.

[4] 1053 f.: ὡς ἐκρεμάσθην λαιμότμητ' ἄχη.

[5] Webster, *Unabridged Dictionary*, *s.v.* "Garotte": "A Spanish mode of execution by strangulation, with an iron collar affixed to a post and tightened by a screw until life becomes extinct."

[6] *Pericles* xxviii.

parallel to fastening in the stocks.[1] Aristophanes[2] speaks distinctly of nails in his burlesque of *apotympanismos*, and Demosthenes[3] uses *προσηλῶσθαι* as a synonym of *ἀποτυμπανίζεσθαι*. Plutarch refuses to believe the story of Duris and says it was invented by Duris to throw discredit upon the Athenians. If the Athenians practiced *apotympanismos* as Keramopoullos conceives it, why did the execution of the Samians in the manner described by Plutarch seem a discredit to the Athenians? We can only conclude that in Plutarch's mind the cruelty consisted in the long duration of the execution. But Keramopoullos' reconstruction of *apotympanismos* is even more cruel.

The execution of the poet Antiphon by *apotympanismos* at the hands of Dionysius the tyrant is of interest. Aristotle, speaking of shame, says:

> And they are more likely to be ashamed when they have to be seen and to associate openly with those who are aware of their disgrace. Wherefore the tragic poet Antiphon, when he was about *ἀποτυμπανίζεσθαι* by order of Dionysius, seeing that those who were to die with him covered their faces as they passed through the gates, said, "Why cover your faces? Is it because you are afraid that one of the crowd should see you tomorrow?"[4]

Does Aristotle mean that by the morrow, being dead, they would no longer feel shame at the prospect of a disgraceful death? This seems to be the natural meaning of the passage.[5]

On archaeological grounds Keramopoullos dates the graves as pre-Solonian and regards this type of punishment as an

[1] According to a law of Solon, if the ecclesia denied an appeal it had the authority to add five days in the stocks as an additional penalty. It was no doubt a severe and ignominious punishment, but there was no intention that it should result in the death of the criminal; cf. Demos. xxiv. 105; *supra*, I, 179. *δέω* is also the normal word for imprisonment because no doubt the prisoners were always put in irons, as in the case of Socrates in Plato *Phaedo* 59E–60B.

[2] *Thesmoph.* 1003. [3] xxi. 105. [4] *Rhet.* ii. 6. 27.

[5] Cf. Barkan, *op. cit.*, pp. 66 ff. It must be recognized that the passage in Aristotle may mean that once fastened to the death plank they would no longer be able to cover their heads in shame for they would be naked. Aeschin. ii. 181 f., cited *infra*, p. 286, proves nothing concerning the duration of suffering.

innovation of Draco.[1] If the date of Keramopoullos be accepted, how are we to account for the proposed execution of Miltiades at a later period by precipitation into the *barathron?* The situation with regard to capital punishment may be reconstructed as follows. In the pre-Draconian period the *barathron* was used as a place of execution. In the early legislation, perhaps that of Solon when all the laws of Draco except those dealing with homicide were repealed, *apotympanismos* was introduced as another means of execution.[2] At a later period the decree of Cannonus[3] was passed specifying the death penalty by precipitation into the *barathron* in cases where the ecclesia voted to apply it. It was well known in 406 B.C. as a form of trial and execution where the accused had aroused the indignation of the populace. That the decree of Cannonus was notorious, as Xenophon says,[4] is also clear from the scene in the *Ecclesiazusae*[5] which would otherwise have been unintelligible to the Athenian audience:

> *τουτὶ τὸ πρᾶγμα κατὰ τὸ Καννωνοῦ σαφῶς*
> *ψήφισμα, βινεῖν δεῖ με διαλελημμένον.*

Here Aristophanes has reference to the form of the trial and not to the punishment. But there are other references to the *barathron* as a place of execution still in use in the latter part of the fifth century. Plutarch[6] reports that on leaving the assembly, where a measure of importance to the city and sponsored by Themistocles had been defeated, Aristides said that "there was no safety for the Athenians unless they threw both Themistocles and himself into the *barathron*." Whether

[1] Here again Arvanitopoulos (*op. cit.*, pp. 17–22) refuses to follow the dating of Keramopoullos because of the unscientific manner in which the various excavations were conducted.

[2] The earliest-known certain instance of *apotympanismos* occurred during the Sicilian Expedition, when the eldest brother of Agoratus was caught making signals to the enemy and by order of the general Lamachus was executed by *apotympanismos* (Lysias xiii. 67).

[3] Cf. *supra*, I, 205.

[4] *Hell.* i. 7. 20: *ἴστε δέ, ὦ ἄνδρες Ἀθηναῖοι, πάντες ὅτι τὸ Καννωνοῦ ψήφισμά ἐστιν ἰσχυρότατον.*

[5] 1089–90.

[6] *Aristides* iii.

a trial or a lynching was contemplated, the *barathron* was conceived of as a place of death. In the *Knights*,[1] Agoracritus questions the reformed Demus:

AGORACRITUS: But answer this;
If any scurvy advocate should say,
"Now please remember, justices, ye'll have
No barley, if the prisoner gets off free,"
How would you treat that scurvy advocate?

DEMUS: I'd tie Hyperbolus about his neck,
And hurl him down into the Deadman's Pit.

Gernet[2] regards the tying of Hyperbolus to the neck of the advocate as referring possibly to the use of a weight to insure death of the precipitated criminal or some other detail of the execution. In any event, it is the death of the advocate and not the disposition of his body that is contemplated. In the *Clouds*,[3] and likewise in the *Plutus*,[4] when references are made to the *barathron* it is suicide which is contemplated. All these references to the *barathron* are quite intelligible when one reflects that in the time of Aristophanes there was always the possibility that it might be used as a place of execution by vote of the ecclesia as was proposed in 406 B.C.

Poisoning by the administration of hemlock (κώνειον) was used and possibly introduced by the Thirty. The evidence adduced by Lipsius[5] is not very strong. Hemlock is mentioned by Aristophanes in the *Frogs*,[6] produced in 405 B.C., as a means of committing suicide used by women.[7] Hence the view that execution by poison was, as Gernet and Glotz put it, *suicide par tolérance*.[8] If hemlock was introduced by the Thirty it must have received legal recognition in the legislation of the restored democracy. Socrates was executed by

[1] 1357 ff. Hager (*Jour. of Phil.*, VIII, 1 ff.) believes that here and in other passages Aristophanes used *barathron* only in a metaphorical sense.

[2] *Op. cit.*, p. 271, n. 4. [3] 1450. [4] 431.

[5] *Op. cit.*, p. 77, n. 101; cf. Barkan, *op. cit.*, p. 77.

[6] 117 ff. When Dionysus is seeking a path to the lower world, hanging, leaping from a high tower, and hemlock are all recommended.

[7] 1051. [8] Gernet, *op. cit.*, p. 267; Glotz, *L'Ordalie*, p. 91.

hemlock in 399 B.C., and a certain Menestratus was executed by *apotympanismos* a considerable time after the overthrow of the Thirty.[1] Hemlock became the normal method of execution,[2] and *apotympanismos* was reserved for certain types of crime specified by law. It is altogether unlikely that a prosecutor could demand a certain kind of execution. In the indictment of Socrates the *timema* is death. It is true, however, than the court may have decided whether the crime charged did in fact fall within the category punishable by *apotympanismos* or by hemlock.

It is difficult to construct from the sources a list of crimes punishable by *apotympanismos*.[3] Normally we are simply told that a man was put to death, but in a few cases the manner of his execution is specified. A client of Lysias says that two of the brothers of Agoratus were executed by *apotympanismos:*

> Now Agoratus, gentlemen, had three brothers. One of them, the eldest, was caught in Sicily making traitorous signals to the enemy, and by Lamachus' order he was executed on the plank. . . . . The third was arrested here by Phaenippides as a clothes-stealer [λωποδύτην ἀπήγαγε], and you tried him in your court: you condemned him to death, and consigned him to execution on the plank.[4]

The use of the word λωποδύτης, cloak-snatcher, at once suggests the class of criminals known as malefactors (κακοῦργοι), which included thieves (κλέπται), kidnappers (ἀνδραποδισταί), house-breakers (τοιχωρύχοι), purse-snatchers (βαλαντιοτόμοι), and cloak-snatchers (λωποδύται). The inclusion of κλέπται is to be explained by the fact that they are caught ἐπ' αὐτοφώρῳ.[5] The eldest brother of Agoratus could be classified as a traitor, as could the hirelings of Philip also. Two passages in Demosthenes bear upon this question. On one occasion, speaking of

[1] Lysias xiii. 56.

[2] Barkan (*op. cit.*, pp. 73–78) has collected considerable information about the source, preparation, and physical effects of hemlock.

[3] Gernet (*op. cit.*, pp. 276 ff.) has a very satisfactory discussion.

[4] xiii. 65–66 (trans. Lamb).

[5] Lipsius, *op. cit.*, p. 320; cf. Gernet, *op. cit.*, pp. 279 ff.

the hirelings of Philip in Athens, he says: "These men who have sold themselves to Philip you should detest and execute by *apotympanismos*."[1] On another occasion he says: "If Philip had heard that those who spoke thus at that time were put to death by *apotympanismos* as soon as they returned here, he would have acted differently."[2] We have here cases which look like treason. Gernet[3] warns us that all we have here is rhetorical exaggeration, but it is not likely that Demosthenes would invoke a punishment not in accordance with the law.[4] There are furthermore the words of Aeschines when on trial for treason (*προδοσία*) which involved the death penalty.

> With all loyalty I have served the city as her ambassador, alone subjected to the clamour of the slanderers, which before now many a man conspicuously brave in war has not had the courage to face; for it is not death that men dread but a dishonoured end. Is he not indeed to be pitied who must look into the sneering face of an enemy, and hear with his ears his insults? But nevertheless I have taken the risk, I have exposed my body to the peril.[5]

The following may be regarded as a probable list of criminals executed by *apotympanismos:*

I. *κακοῦργοι.*

II. *προδόται* caught in the act, as was the brother of Agoratus when signaling to the enemy.[6]

III. To these criminals we may add those who were subject to summary arrest because they were caught in the act of exercising certain forbidden privileges, as, for example, murderers and traitors who returned from exile without permission. It is to be observed that all of these cases fall within the process of *apagogé.* In other words, anyone caught in the

[1] viii. 61.

[2] xix. 137.

[3] *Op. cit.*, pp. 276 f.

[4] Cf. Barkan, *op. cit.*, p. 71.

[5] ii. 181 f. (trans. Adams). Aeschines is referring to *apotympanismos*, a public execution, rather than to hemlock, which seems to have been administered within the prison walls.

[6] Lysias xiii. 67. The passages in Demos. viii. 61; xix. 137, are mere attempts to arouse his audience against the pro-Macedonian politicians by classifying them as *προδόται* technically caught in the act of betraying their country. Even so interpreted the passages furnish some indication that *προδόται* were included in the list.

act of stealing, betraying his country, or, after going into exile for murder or treason, returning without legal permission was executed by *apotympanismos*.

IV. There is the problem of the execution of convicted murderers, which Gernet regards as insoluble.[1] It is probable that they also were executed by *apotympanismos*. In Lysias[2] it is said that one Menestratus was tried as an ἀνδροφόνος and executed by *apotympanismos*.[3] It is known that the nearest relatives of the murdered man had the privilege of being present at the execution; and the words of Aeschines quoted above at once suggest *apotympanismos*. In speaking of the way Midias treated his enemies Demosthenes says:

> Having but one object in view, to destroy me by every possible means, he would leave no stone unturned, as if it were right that any person who has been insulted by Midias, and determines to obtain redress instead of holding his tongue, should be utterly exterminated and not allowed to rest, should even stand convicted of desertion of post, and be exiled on a charge of murder, and all but crucified [ἐφ' αἵματι φεύγειν καὶ μόνον οὐ προσηλῶσθαι].[4]

[1] *Op. cit.*, p. 265, n. 3.

[2] xiii. 56; cf. *supra*, I, 212 f., for earlier proceedings concerning Menestratus.

[3] Gernet (*op. cit.*, p. 277) suggests that he might have been brought to trial by the process of *apagogé*.

[4] xxi. 105 (trans. Kennedy).

CHAPTER XI

ESTIMATES OF ATHENIAN JUSTICE

It is a difficult matter to form an adequate opinion of the effectiveness of the Athenian system of justice. One of the main difficulties in such an investigation is the fact that we hear only one side of a case and rarely know what the verdict was. It is always easy to quote the opinions of modern lawyers and philologians. Rogers, who spent his leisure hours for years with Aristophanes, has this to say:

> I must record my opinion as an English lawyer, that it would be difficult to devise a judicial system less adapted to the due administration of justice. A large assembly can rarely if ever form a fit tribunal for ascertaining facts or deciding questions of law. Its members lose their sense of individual responsibility to a great extent, and it is apt to degenerate into a mere mob, open to all the influences and liable to be swayed by all the passions which stir and agitate popular meetings.[1]

From among the philologians we may select the considered estimate of Wyse, editor of the speeches of Isaeus:

> There is no evidence that the Athenian judges were often bribed or terrorized or intentionally dishonest. Neither did the discretion granted them in the absence of a statute become an instrument of oppression. This danger, though real enough, was diminished by the number and representative character of the judges, who were not likely to treat as criminal, acts tolerated by public opinion. But the speeches of the orators are a convincing proof, if proof be needed, of the vices inherent in such a system. The amount of injustice done cannot now be estimated, but it is sufficient condemnation of the courts, that appeals to passion and political prejudice, insinuating sophistry, and outrageous misrepresentations of law were judged by shrewd and experienced observers suitable means to win a verdict. No development of law was possible; nothing excited the suspicion and mistrust of the judges so much as a display of legal subtlety. . . . . The conclusions of a court were bare affirmations or negations, not discriminating between law and fact, applicable only to a particular case and based on reasons which were known only to the individual voters, and perhaps not always to them. And these decisions, such as they were, could

[1] Introd. to Aristoph. *Wasps*, pp. xxvi f.

not bind another court, for in theory and practice the courts were equal and independent, each being a committee of the sovereign people supreme and irresponsible.[1]

Contemporary writers had plenty of fault to find with the Athenian system, though mainly for different reasons than those offered by modern jurists and philologians. Pseudo-Xenophon, writing in the last quarter of the fifth century, complains of the congestion of the courts, caused by the fact that

in the first place, they have to keep a greater number of festivals than any of the Greek cities, during which there is less possibility of any of the city's business being transacted, and in the second place have to give a decision upon more lawsuits, prosecutions, and audits than the rest of mankind put together.[2]

Comedians were not slow to jest about litigation in Athens. "You Athenians do nothing but try cases," says one of the characters in the *Peace* of Aristophanes.[3] In the *Clouds*, when Athens was pointed out on a map of Greece, Socrates refused to believe it, for he saw no juries in session.[4]

These jests need not be taken too seriously, for Aristophanes as well as Pseudo-Xenophon must have had a better idea of the causes of this flood of litigation than the casual modern reader of the ancient sources would suspect. "For, not even at present," says Pseudo-Xenophon, "when sitting through the year, do they avail to keep evildoers in check, owing to the largeness of the population."[5] But there were other reasons than the size of the population. Much Athenian litigiousness was due to certain features of their legal and political system which are wholly unknown to modern systems.

The annual scrutiny, *dokimasia*, of elected and allotted magistrates was in the majority of cases a matter of form and

[1] In Whibley, *Companion to Greek Studies*[4], p. 473.

[2] *Const. of Athens* iii. 2 (trans. Brooks).

[3] 505.

[4] 207 f. Cf. *Birds* 39–41; Telecleides *Amphictyons*, *Frag.* 2: "But, oh ye who are best of all citizens at blackmail and litigation, cease your cannibalistic lawsuits" (trans. Norwood).

[5] *Op. cit.* iii. 6.

could have been finally disposed of by a board of scrutineers (e.g., the outgoing members of the boulé), but democracy as conceived in the ancient world would delegate no real power to any board, no matter how constituted. Provision was made for the intervention of the courts either to confirm the findings of the retiring council in the case of the nine archons and the new council or in the case of all other officials to deal with the scrutiny from the beginning.[1] The vote on the recall (ἐπιχειροτονία) of the magistrates each prytany permitted a volunteer accuser to intervene if he had a grievance.[2] On the expiry of the official year all officers in the administration had to submit their accounts. Only the courts could grant final release. Here again the volunteer was invited to participate. But even this was not considered sufficient guaranty. For three days *euthynoi* sat before the statues of the eponymous heroes of the tribes and received any kind of case against the retiring magistrates. Private suits, *dikai*, were handed to the Forty; criminal charges, *graphai*, to the thesmothetai. These elaborate provisions must have created an atmosphere of suspicion which fostered litigation and encouraged all kinds of charges.

The peculiar Athenian system of legislation which made the mover personally responsible for the law or decree he sponsored by means of the *graphé paranomon* was the cause of an extraordinary amount of litigation. The personal liability did not extend beyond a year, but the legislation could be assailed at any time. Naturally the mover was always involved. The attack on the law was still in effect an attack on him by his political opponents or their henchmen.

A feature of the Athenian system of taxation was responsible for a type of litigation unknown in modern times. If a citizen appointed to perform one of the more costly liturgies felt that someone else was more able to assume the burden, he might challenge him to perform it or to exchange properties with the challenger, who would then perform the liturgy.

[1] Arist. *Ath. Pol.* xlv. 3; lv. 2; Lipsius, *Das Attische Recht*, p. 271.

[2] Cf. Lipsius. *op. cit.*, p. 295.

This was known as *antidosis*.[1] If both proposals were rejected the matter came before the court by way of an interpleader, *diadikasia*.[2]

The Athenians understood quite well the importance of the prosecutor in the administration of criminal justice. "Both the laws and the courts are powerless," says Lycurgus, "without someone to bring offenders to justice."[3] Solon solved the problem of how to initiate prosecutions by permitting volunteers to prosecute. Under the pre-Solonian oligarchy the injured party alone had the right to seek justice against the wrongdoer. If the state was injured by high crimes and misdemeanors, the magistrates and the members of the Areopagus took the necessary steps to bring the wrongdoers to justice upon information furnished them. Solon's famous provision permitting anyone who pleased to prosecute any wrongdoer, whatever its merits, was responsible for a number of abuses, the chief of which was sycophancy in the Greek sense. The Athenians were well aware of the evils that developed from this provision. The comedies of Aristophanes and the forensic orations abound in denunciations of the sycophants. A number of measures were adopted to restrain them, but they were never suppressed. Both the advocates and the critics of democracy recognized the necessity of having volunteer prosecutors. Aristotle, who was not hostile to democracy, selects for approval three outstanding democratic features of the Solonian constitution. Of these the second is *τὸ ἐξεῖναι τῷ βουλομένῳ τιμωρεῖν ὑπὲρ τῶν ἀδικουμένων*.[4] And yet Aristotle was as aware as any Athenian could be of the abuses of the system which were fully developed when he was writing. Pseudo-Xenophon, a caustic critic of democracy and all its ways, finds fault with the congestion of the courts but has nothing to say about volunteer prosecutors. Plato offers no substitute for the volunteer prosecutor but accepts him, as the following words show:

[1] Cf. Goligher, "The *Antidosis*," *Hermathena*, XIV, 481 ff.

[2] For a discussion of other unusual aspects of Athenian litigiousness cf. Bonner, *Lawyers and Litigants*, pp. 96–112.

[3] i. 4.

[4] *Ath. Pol.* ix.

> Worthy of twice as much honor as he [who does no wrong], and more, is the man who, in addition, consents not to wrongdoers when they do wrong; for while the former counts as one man, the latter counts as many, in that he informs the magistrates of the wrongdoing of the rest. And he that assists the magistrates in punishing, to the best of his power,—let him be publicly proclaimed to be the Great Man of the State and perfect, the winner of the prize for excellence.[1]

And Isocrates, when proposing a return to the ancient democracy, approved of the volunteer prosecutor.[2]

Athens was not the only democracy that suffered from sycophants. According to the laws of Charondas, "those convicted of sycophancy were to go about crowned with tamarisk." The laws of Charondas were fitted to democratic constitutions in various Sicilian cities.[3] Aristotle[4] associates the excesses of demagogues and sycophants as frequent causes of the overthrow of democracy. It is quite plain that the abuses for which the volunteer prosecutor was responsible were inherent in democracy.[5]

In democracy as organized in Athens, there was no place for elected or appointed public prosecutors to bring to justice all alleged criminals. On occasion special prosecutors or advocates, *synegoroi*, as they were called, were chosen to handle

[1] *Laws* 730D.

[2] vii. 42. In modern communities the public prosecutor often prevents the prosecution of alleged criminals by refusing for one reason or another to take action. The result is that many criminals escape indictment to say nothing of conviction. Again in some jurisdictions prosecutors or judges reduce a charge to a less serious category. Sometimes this is done to induce the criminal to plead guilty to the lesser crime with a lighter sentence. More often, however, bribery and dishonest local politicians are involved. None of these abuses is found in Athens. A volunteer prosecutor might be bribed, but there was no assurance that another might not push the charge. Nor could the criminal expect leniency in the classification of his crime. For all judicial officials were held strictly responsible for their official acts.

[3] Cf. Diodorus xii. 11–12; for a list of these cities cf. *supra*, I, 69–70.

[4] *Pol.* 1304B. 20.

[5] In the words of Plutarch, "Not only as Simonides says 'on every lark must grow a crest' but also in every democracy must spring up a false accuser" (*Timol.* 37; Bergk, *Frag.* 68; cf. Lofberg, *Sycophancy*, p. 10, n. 53).

prosecutions which were regarded as particularly important.[1] One is obliged to admit that if neither the friends nor the critics of democracy ever suggested changing Solon's famous provision its excellencies must have more than counterbalanced the evils that grew out of it. Its success was due to the high sense of civic duty developed in the Athenian citizen body as compared with modern political communities.

The greatest offense of the Athenian system in the eyes of modern critics lies in the large popular juries. But one must remember that in Greek political theory democracy and popular juries are inseparable. In Athens, Pseudo-Xenophon says, cases are tried ἐν τῷ δήμῳ.[2] A man was not a real citizen unless he shared in political office and the administration of justice. Aristotle defines a citizen as one who has the right to take part in the deliberative or judicial administration of the state.[3] In a democracy such a theory leads to large popular courts whose shortcomings were recognized both by political theorists and by the oligarchic opponents of democracy. Plato does not construct in the *Republic* an ideal judicial system, but he makes it clear that he believes that judges should be experts and not cross-sections of the citizens drafted for the work. "In this state and in this only shall a shoemaker be a shoemaker and not a pilot also, and a farmer be a farmer and not a dicast also."[4] But in the *Laws*, a more practical treatise, he accepts the normal Greek view with few reservations.

> Every magistrate must also be a judge of some things. . . . . In the judgment of offenses against the state the people ought to participate, for when anyone wrongs the state they are all wronged, and may reasonably complain if they are not allowed to share in the decision. . . . . And in private suits, too, as far as possible, all should have a share; for he who

[1] The manner in which Pericles handled the prosecution of Cimon shows that ancient like modern prosecutors were not without fault. Cf. advocates in Aristophanes, *supra*, pp. 27 ff.

[2] *Op. cit.* i. 19.

[3] *Pol.* 1275A, 1281B. Aristotle extends the word "office" (ἀρχή) to include membership in a democratic assembly.

[4] *Rep.* 397E.

has no share in the administration of justice, is apt to imagine that he has no share in the state at all.[1]

Plato indicates very clearly his distrust of large popular courts, as the following words show: "Where courts are noisy and disorderly, as in a theater, clapping or hooting in turn this or that orator, the legislator should allow them to ordain the penalties only for the smallest offenses."[2] Aristotle, however, with some hesitancy maintains that the multitude, with all its defects, is a better judge than a superior few:

For the many, of whom each individual is but an ordinary person, when they meet together may very likely be better than the few good, if regarded not individually but collectively, just as a feast to which many contribute is better than a dinner provided out of a single purse.[3]

But doubts assail him:

Whether this principle can apply to every democracy, and to all bodies of men, is not clear. Or rather, by heaven, in some cases it is impossible of application; for the argument would equally hold about brutes. . . . . But there may be bodies of men about whom our statement is nevertheless true. And if so, the difficulty which has been already raised, and also another which is akin to it—viz. what power should be assigned to the mass of freemen and citizens, who are not rich and have no personal merit —are both solved. There is still a danger in allowing them to share the great offices of state, for their folly will lead them into error, and their dishonesty into crime. But there is a danger also in not letting them share, for a state in which many poor men are excluded from office will necessarily be full of enemies. The only way of escape is to assign to them some deliberative and judicial functions.[4]

Aristotle, in reporting the institution of pay for the dicasts, says:

Pericles was the first to institute pay for service in the lawcourts, as a bid for popular favor to counterbalance the wealth of Cimon. . . . . Some persons accuse him of thereby causing a deterioration in the character of the juries, since it was always the inferior people who were anxious to submit themselves for selection as jurors, rather than the men of better position.[5]

[1] *Laws* 767A–768B (trans. Jowett). [2] *Ibid.* 876B.

[3] *Pol.* 1281B (trans. Jowett). [4] *Ibid.* [5] *Ath. Pol.* xxvii. 4 (trans. Kenyon).

It seems likely that Aristotle has in mind a criticism of Plato, who in the *Gorgias*[1] represents Socrates as saying:

> I should like to know whether the Athenians are said to have been made better by Pericles, or, on the contrary, to have been corrupted by him; for I hear that he was the first who gave the people pay, and made them idle and cowardly and encouraged them in the love of talk and of money.

The rejoinder of Callicles that Socrates must have heard that from the philo-Spartan set shows that his was the view of the conservatives who, if not openly antidemocratic, were at least strongly opposed to the extreme type of democracy developed in Athens.

It has been objected that the verdicts of Athenian courts are mere affirmations or negations. Hippodamus, in his constitution, proposed that every dicast "should have a tablet on which he might not only write a simple condemnation, or leave the tablet blank for a simple acquittal; but, if he partly acquitted and partly condemned, he was to distinguish accordingly."[2] Aristotle roundly condemns the proposal because in practice it would be unworkable. How could votes of this kind be counted?

In the fifth century when the same dicasts were assigned to one court for a whole year a certain amount of bribery was possible. But few would have the means to bribe a sufficient number of dicasts to make sure of an acquittal. Aristotle says that bribery began after the introduction of pay and that Anytus in 409 B.C. was the first to employ bribery.[3] It is known that suggestions were being made in the late fifth century to ameliorate the notorious congestion of the courts. Pseudo-Xenophon[4] objects to the proposal that the number of courts be increased by decreasing the number of dicasts in each panel because of the increased danger of bribery. But in any event the method of assigning dicasts to the various courts in the fourth century must have rendered bribery practically impossible. This is the period in

[1] 515E. [2] Arist. *Pol.* 1268A.

[3] *Ath. Pol.* xxvii; cf. Diodorus xiii. 64. 6; Plut. *Coriolanus* xiv.

[4] *Op. cit.* iii. 6–7.

which all the forensic speeches except those of Antiphon fall. It is clear that in spite of the doubts voiced by some scholars bribery had no effect on the administration of justice in Athens.[1]

In one respect at least the Athenian system challenges favorable comparison with the best of the modern systems. Practically all civil disputes were submitted to arbitration. The arbitrator was a man of experience and at first attempted to induce the parties to reach a settlement acceptable to both. Failing this, he gave a judgment on the merits of the case which was subject to appeal. In consequence of this system a litigant in a civil suit had an opportunity to present his case in the most informal manner to a single judge of age and experience where rhetoric played no part in the case, and where the reasons for the decision were doubtless set forth. Moreover, he was twice given the opportunity to avoid having his case tried in a popular court. It is not now possible to tell how successful arbitration was, but it is to be noted that on several occasions the speaker tells the court that an attempt had been made to settle the case without trial. In the settlement of estates, however, there was no arbitration, and in no other class of case could a large jury be so ineffective. The modern reader of the speeches of Isaeus dealing with the devolution of estates can follow most of them only with a family tree of the persons involved. Indeed, one speaker was so aware of this difficulty that he had thought of using some such device in court but abandoned the idea because he realized that only a portion of the dicasts could see the writing. Under these circumstances miscarriages of justice could scarcely be avoided.

In the so-called *graphé paranomon* the Athenians had a parallel to a function of the Supreme Court of the United States.[2] Any citizen who deemed that a law or a decree was illegal could institute a criminal action against it. If the action was brought within a year, the sponsor was personally

[1] Gilbert, *Const. Antiqu.*, p. 415, n. 4.

[2] Cf. Thomas Goodell, *Yale Review*, II, 64 ff.

liable. The entry of the suit at once suspended the law or decree in question. If the legislation was found to be illegal by the court, it thereby became null and void. In the United States only the person directly wronged can appeal to the courts for protection against what he claims is an unconstitutional law. But his suit raises the question indirectly. The rule of precedents, however, enables any citizen wronged in the same manner to avail himself of the benefit of the court decision because no one will take action against him. Hence the law complained of becomes unconstitutional only indirectly. Moreover, it constantly happens that a part of a law may become unconstitutional while other parts must wait for victims to challenge them. The great advantage of the Athenian system lay in the fact that the constitutionality of legislation could be raised and finally settled before any citizen suffered wrong. Public advocates were always chosen to defend the law, but any citizen could speak for or against the law. The court, like any other dicastery, was a cross-section of the people and so represented public opinion. Here again the Athenian system compares favorably with a modern system.

Witnesses were not so important in Athens as in a system where the court hears the facts as told by witnesses and summed up by counsel. Athenian dicasts heard the facts of the case from the litigant himself with supporting testimony at various points. In the fifth and early fourth centuries witnesses were questioned by the litigants. Later they merely acknowledged affidavits prepared beforehand. In neither system was there any provision for cross-examination. In the absence of cross-examination a litigant could venture upon questions and produce affidavits that would be dangerous if the witness was subject to cross-examination. But the lack of cross-examination is not so serious a matter as it would be in a modern system, for such pieces of evidence as are extant are quite simple and brief. The nearest approach to cross-examination was the questions addressed by a litigant to his opponent, but here again the extant orations furnish no such examples as Socrates' examination of Meletus. Nor

is it surprising. A man who bought his speech from some logograph would be running serious risks if he undertook to question a clever opponent.

It is not to be expected that litigants will in open court criticize the dicasts upon whom their success or failure in their litigation depends. In forensic theory the dicasts did no wrong. The unscrupulous prosecutors were responsible for all miscarriages of justice. Few litigants had the hardihood of the Platonic Socrates, who roundly condemned the common practice of bringing weeping children and female relatives into court.

> Perhaps there may be some one who is offended with me as he calls to mind how he himself on a similar or even less serious occasion had recourse to prayers and supplications with many tears, and how he produced his children in court together with a posse of friends and relatives; whereas I who am probably in danger of my life will do none of these things. Perhaps this may come into his mind and he may vote in anger because he is displeased. I say these things ought not to be done; if they are done you ought not to permit them.[1]

He further protests against the practice of allowing popular prejudice to influence verdicts. He observes:

> My conviction, if I am convicted, will be due not to my accusers, but to longstanding calumnies and prejudices. These have convicted many a good man, and it is not likely that my case will prove an exception.[2]

Andocides shows some boldness in comparing the deliberations of the boulé with the decisions of the dicasts. He remarks:

> The boulé is less likely than you to make a mistake, for they deliberate at leisure and are liable to be blamed and held in ill repute by the rest of the citizens. But there is no one to find fault with you. For it is your right to dispose of matters that come before you well or ill as you please.[3]

Here and there in current literature we find criticisms of the Athenian judicial system. Pseudo-Xenophon[4] asserts that the Athenians are less concerned with justice in their courts

[1] Plato *Apol.* 34C.

[2] *Ibid.* 28A–B.

[3] Andoc. ii. 19.

[4] *Ath. Pol.* i. 18.

than with what is advantageous to themselves. This view may be dismissed as the normal oligarchic attitude. Of more importance is a later admission in which he points out to interested oligarchs that there is little chance of overthrowing such a democracy.

> Someone might retort that after all no one has been unjustly disfranchised at Athens, to which I reply that there are some who have been unjustly disfranchised, but only a few. However, it will need more than a few to make an attack upon the democracy at Athens, the truth of the case being that men who have been justly disfranchised do not take it to heart, but only those who have suffered unjustly. Now, how could anyone suppose that the majority would have suffered unjustly at Athens, where it is the people who hold the official posts? No, it is for misconduct in office, or in speech or act, for such reasons as these that men are disfranchised there. From these considerations one must not think that there is any danger from the disfranchised class at Athens.[1]

Aristophanes, according to prevailing opinion, devoted the *Wasps* to a criticism of the Athenian dicasteries. "Mr. Grote," says Rogers, "is merely stating the popular view as well as his own, when he says that the poet's purpose was to make the dicasts monsters of caprice and injustice." But Rogers has rightly divined the real purpose of the *Wasps*. It is really an attack on the demagogues who exploited the dicasts for their own political purposes. But a comedy must have humor. This is furnished mainly by Philocleon, whose name at once suggests the relationship between the dicasts and the reigning demagogue. He is a grotesque exaggeration of the normal dicast who is so admirably and admiringly represented in the chorus—the Marathonian heroes whom Aristophanes delighted to honor.

> We the only true-born Attics, of the staunch heroic breed,
> Many a time have fought for Athens, guarding her in hours of need;
> When with smoke and fire and rapine forth the fierce Barbarian came,
> Eager to destroy our wasps-nests, smothering all the town in flame,
> Out at once we rushed to meet him: on with shield and spear we went,
> Fought the memorable battle, primed with fiery hardiment;
> Man to man we stood, and, grimly, gnawed for rage our under lips.
> Hah! their arrows hail so densely, all the sun is in eclipse![2]

[1] *Ibid.* iii. 12–13.

[2] Aristoph. *Wasps* 1077–90; cf. 230–39.

Of Philocleon one of the slaves says in explaining the plot:

> I'll tell you the disease old master has.
> He is a LAWCOURT-lover, no man like him.
> Judging is what he dotes on, and he weeps
> Unless he sit on the front bench of all.[1]

And again:

> He of us all, I ween,
> Was evermore the austerest, and most keen.
> Alone no prayers he heeded:
> Whene'er for grace they pleaded,
> He bent (like this) his head,
> *You cook a stone*, he said.[2]

The fact that *The Wasps* obtained the second prize is significant. If the judges and the audience had thought that Aristophanes was attacking democracy in one of its fundamental principles, or if they had taken his jests seriously, his play would have received a rough reception. Support is lent to this interpretation of Rogers by Isocrates, who in the fourth century deplores the same situation.

> Who of the friends of democracy is not pained to see the numbers of citizens standing around the courts hoping to be drawn for service in order to secure the means of subsistence?[3]

> I am surprised that you are unable to realize that no class is more ill disposed to democracy than the vicious politicians and demagogues. Seeing a portion of the citizen body, owing to their poverty and dependence upon the income from attendance at courts and assemblies, obliged to be at their beck and call they rejoice at the increase of impeachments, indictments and other vexatious litigation which they encourage.[4]

The Athenians were fond of oratory, and there were plenty of skilled speakers ready to gratify their desire. Thucydides puts into the mouth of Cleon a striking condemnation of Athenian preoccupation with oratorical displays:

> Misled by clever speakers the people make dangerous concessions to the subject states. The sophisticated members of the assembly ought rather to give good advice than to seek occasions for the display of eloquence and cleverness and become rivals in oratory for popular applause. In such rhetorical contests the city gives away the prizes to others while she takes the risk upon herself. And you are to blame for ordering these contests

[1] *Ibid.* 87–90. [2] *Ibid.* 277–81. [3] vii. 54. [4] viii. 129–30.

amiss. When speeches are to be heard you are too fond of using your eyes, but where actions are concerned you use your ears. You are slaves of each paradox and contemptuous of the familiar. Not a man of you but would be an orator if he could. In a word you are at the mercy of your ears and sit like spectators attending a performance of sophists rather than counsellors of state. Do not hold out a hope which eloquence can secure. . . . . Do not be misled either by pity or by the charm of words. . . . . Our charming orators will have another occasion for display where the issues are not so serious.[1]

This attitude toward oratory rendered the large popular juries particularly unfitted for dispensing justice. It is not surprising that men of the older generation thought that those skilled in rhetoric could make the worse appear the better reason. Again and again defendants deplore their inability to speak in public. On the eve of the trial of Socrates a friend urging him to make a good preparation for his defense inquires, "Do you not see that the Athenian dicasts frequently become angry and put innocent men to death and frequently acquit those guilty of wrong, moved to pity by their eloquent speeches?"[2] One is not so much impressed by these complaints when it is recalled that all the litigants who voice them are using speeches composed for them by experts. Neither is it to be forgotten that the speech of the prosecutor also may be composed by an expert. But be that as it may, rhetoric was a weapon which gave a litigant an undue advantage. It is interesting to note that the people themselves were suspicious of the new rhetoric. Thucydides, in his famous characterization of Antiphon, says that

although he did not come before the assembly or willingly take part in any public contest but was under suspicion with the people on account of his reputation for cleverness yet he was the one man most able to help any who were involved in contests either in court or before the assembly in case they sought his advice.[3]

[1] Thuc. iii. 38. (paraphrased) The whole Mytilenaean episode well illustrates the characteristics of the Athenians which Cleon here attributes to them. At first they condemned the whole male population to death, the normal procedure in dealing with revolting allies (iv. 122, 6). In a second vote they decided to put to death only those who were proved guilty of the revolt. Viewed from another angle, the whole incident is a striking illustration of the essential mildness of the Athenian character.

[2] Xen. *Apol.* 4.

[3] viii. 67.

Plato takes high ground in his condemnation of rhetoric in the courts. In his dialogue named after the famous Sicilian rhetorician Gorgias, Socrates inquired:

"What is rhetoric, Gorgias?"[1]

"Rhetoric is the art of persuasion in courts and other assemblies about the just and the unjust" [replied Gorgias].

"And what sort of persuasion does rhetoric produce in courts of law and other assemblies about the just and the unjust? Is it the sort of persuasion which gives belief without knowledge or that which gives knowledge?"

"That which produces belief only."

"The rhetorician, then, need have no real knowledge; he has only to discover some way of persuading the ignorant that he has more knowledge than those who know" [concluded Socrates].

To the same effect is a passage in the *Theaetetus* of Plato.

Orators and lawyers persuade men by their art and make them think whatever they like, but they do not instruct them. Do you imagine that there are any teachers in the world so clever as to be able to convey to others the truth about acts of robbery and violence of which they were not eyewitnesses while a little water is flowing in the hourglass?[2]

In theory this view is correct, no doubt, but it is wholly impractical. How else can a litigant put his case before a court than by words?

Courts may err either on the side of laxity or on the side of severity. Isocrates in the *Areopagiticus* by implication criticizes the laxity in the administration of justice in his own day:

For they saw that in cases of contract the judges were not in the habit of indulging their sense of equity but were strictly faithful to the laws; and they did not in trying others seek to make it safe for themselves to disobey the law, but were indeed more severe on defaulters than were the injured themselves, since they believed that those who break down confidence in contracts do a greater injury to the poor than to the rich. . . . .[3]

In another speech Isocrates plainly sets forth the animosity of the poverty-stricken masses toward men of wealth:

[1] *Gorgias* 454B, E; 459B, C. The passage is paraphrased.

[2] 201B.

[3] vii. 33–34.

Some jurors are so savage and so hostile that because of their envy and their poverty they are enemies not of wickedness but of success, and hate not only the most moderate citizens but the most righteous conduct. This is bad enough. But they even side with wrongdoers on trial and acquit them, while they put to death those whom they envy if they can.[1]

Demosthenes also finds fault with the light-hearted irresponsibility of the dicasts of his day:

You, O Athenians, acquit men who are guilty and plainly proved to be guilty of the gravest offenses, if they merely say one or two witty things, and some fellow-tribesmen chosen to be their advocates petition for them: should you even convict any one, you fix the penalty at five-and-twenty drachmas.[2]

Apparent laxity may have justification in the fact that there was no high authority to exercise clemency or grant pardons in the Athenian system. Accordingly the large popular courts had to exercise these powers and take account of extenuating circumstances. In these conditions an acquittal may amount to a pardon. And a large popular jury was well suited to exercise these functions.

Over-severity in a democratic system of justice cures itself more readily than laxity. It is felt that it is better to let ten guilty men go free than to punish one innocent man. The code of Draco provided death as the penalty for a long list of crimes. Solon, with full popular support, repealed all the laws of Draco except the homicide laws, because they were "written in blood." In only a few cases was the death penalty obligatory by laws. Otherwise it was left to the dicasts to determine the penalty. In England at the beginning of the nineteenth century over two hundred crimes were capital by law. If a jury found a man guilty, the law took its course unless the criminal was pardoned. To be sure all this is changed now, but the fact remains that until the beginning of the nineteenth century the administration of criminal justice in England was in all probability quite as severe as it was in fifth-century Athens. In one extant case, the trial and execution of the generals in 406 B.C., there was a miscarriage of justice due to the passions aroused in the people

[1] xv. 142. [2] xxiii. 206.

generally as well as the relatives of the seamen who perished.[1] The Athenians themselves soon recognized their mistake and took measures to bring to justice those who were regarded as mainly responsible for the prosecution.

One of the most remarkable instances of national self-restraint was the amnesty of 403. The victorious democracy had at its mercy many of the men responsible for the execution of fifteen hundred adherents of democracy during the tyranny of the Thirty, and yet they decided to let bygones be bygones. The amnesty was always a matter of just pride to Athenians of later generations. Aristotle[2] took occasion to remark on the Athenian law against would-be tyrants. They and their descendants were disfranchised.

Modern critics of the Athenian judicial system naturally compare it with contemporary systems. Grote[3] alone has recognized that modern standards should not be used entirely in estimating the effectiveness of the administration of justice in Athens. He reminds us that "the distinction between powers administrative and judicial, so highly valued among the more elaborate governments of Europe, since the political speculations of the last century, was in the early history of Athens almost unknown." In England before the distinction between judicial and administrative powers was in force an alleged criminal was much more harshly treated than an Athenian citizen in like circumstances. Thayer says:

> In England the king in criminal cases was no mere ordinary party to an action: the procedure was heavily weighted in his favor. In treason and felony the accused could not have counsel; later when witnesses could be had for the crown, the accused could not have them; and still later when he also could have them, his witnesses could not be sworn.[4]

[1] Xen. *Hell.* i. 7. 16 ff.; cf. Thuc. vii. 48. 3. In his refusal to withdraw from Sicily before the final disaster without authorization from home, Nicias recognized how volatile and easily influenced the Athenians were in their dealings with defendants in matters affecting the nation. One is tempted to think that Thucydides has in mind the fate of the generals after the battle of Arginusae.

[2] *Ath. Pol.* xvi.

[3] *History of Greece*, V, 237.

[4] *Preliminary Treatise on Evidence at the Common Law*, p. 157.

In a note Thayer cites a case in the year 1565 in which a robber was on trial. There were no witnesses for the prisoner at the bar, only for the crown. Other cases are also cited to the same effect. An Athenian, although he must plead his own case, could have a speech written for him and could have counsel and witnesses. His rights in these respects were the same as the prosecutor's.

Grote points out an aspect of the Athenian system of popular courts that usually escapes notice.

> To make the rich and powerful effectively amenable to justice has indeed been found so difficult everywhere, until a recent period of history, that we should be surprised if it were otherwise in Greece. . . . . Now the dikasteries were inaccessible both to corruption and to intimidation: their number, their secret suffrage, and the impossibility of knowing beforehand what individuals would sit on any particular case prevented both the one and the other. And besides that the magnitude of their number, extravagant according to our ideas of judicial business, was essential to this tutelary effect—it served farther to render the trial solemn and the verdict imposing on the minds of parties and spectators, as we may see from the fact that in important causes the dikastery was doubled or tripled. Nor was it possible by any other means than numbers to give dignity to an assembly of citizens of whom many were poor, some old, and all were despised individually by the rich brought before them. . . . . These numerous dikasteries offered the only organ which Grecian politics could devise for getting redress against powerful criminals, public as well as private, for obtaining a sincere and uncorrupt verdict.[1]

Solon, in allowing an appeal to the Heliaea, had in mind this very situation, and a perusal of Demosthenes' indictment of Midias will convince any reader that only a court that was so large that it could neither be bought nor be intimidated could deal with such a man as Midias.

The general respect accorded the Areopagus as a court might seem to indicate that a select body, including the former archons who had stood the test of the *euthyna*, might have been a satisfactory group from which to draw panels for both criminal and civil cases; but the reforms of Ephialtes and Pericles show clearly that democracy was determined to control both administrative and judicial powers. For, as

[1] *Op. cit.*, V, 237 ff.

Aristotle[1] observes, the control of the courts made the people sovereign of the state.

There is no doubt that the large popular courts of Athens, subject to personal and political prejudices, swayed by oratory, deceived by unscrupulous prosecutors and uncontrolled by expert judges, deserve the strictures of Rogers. But we leave to the reader to decide whether after all it was not as good a system as Greek democracy could devise to protect the rights of the humblest of its citizens. "In the eyes of the law," says Pericles, "all are on an equality as regards the settlement of their private disputes."[2]

[1] *Ath. Pol.* ix.

[2] Thuc. ii. 37; cf. Hyper. iv. 36 quoted *supra*, pp. 49 f.

I

GENERAL INDEX

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Harry C Clancy
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